Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PEARSON EDUCATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board infringes upon an employer's First Amendment rights when it interprets a one page written communication made during a union organizing campaign to be a threat if the individual statements in that single communication, on their face, are accurate and otherwise lawful and when it fails to even consider other surrounding communications on that same topic?

2. In a non-*Gissel* bargaining order case, what effect should significant changed circumstances that have occurred since the time, years earlier, that the National Labor Relations Board originally designated and certified the bargaining unit, but before final resolution of the parties' obligation to bargain in that unit, have on the continued appropriateness of that unit and the Section 7 self determination rights of all current employees, who had no opportunity to exercise that right.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that Pearson Education, Inc. is engaged in the publishing and distribution of books and related materials. It is a Delaware corporation which is a wholly-owned indirect subsidiary of Pearson, Inc., which is itself a wholly-owned indirect subsidiary of Pearson plc, which is publicly traded in the United Kingdom and the United States.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F.3d 127. (App. 1a-11a). The National Labor Relations Board's August 1, 2002 decision denying rehearing and reopening of the record is unreported. (App. 19a-42a). The Board's October 31, 2001 decision is reported at 336 NLRB No. 92. (App. 19a-42a). The prior related decision of the Court of Appeals in this case is reported at 194 F.3d 165. (App. 43a-49a). The initial decision of the National Labor Relations Board is reported at 327 NLRB No. 17. (App. 50a-59a). The Regional Director's May 15, 1998 decision overturning the first election and ordering another election is unreported. (App. 60a-67a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia enforced the decisions of the National Labor Relations Board and entered judgment on July 6, 2004. This petition is timely because Petitioner has filed it within 90 days of July 6, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the First Amendment of the United States Constitution in interpreting Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c). It also involves interpretation of employees' rights under Section 7 of that Act.

The First Amendment of the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

29 U.S.C. § 157 provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

29 U.S.C. § 158(c) provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

> provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

29 U.S.C. § 160(f) provides in pertine part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is filed to review a decision of the United States Court of Appeals for the District of Columbia granting the National Labor Relations Board's Cross-Petition and enforcing its orders. The Court of Appeals had jurisdiction pursuant to Section 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f). *See Boire v. Greyhound Corp.*, 376 US 473, 476-77 (1964).

A. The Election Petition And Unit Determination.

Macmillan Publishing (Macmillan or the Company) had two - distribution operations in Indianapolis, Indiana at Northwest Boulevard and Rockville Road, as well as operations in other states. In 1997, Macmillan had a state of the art facility under construction at Lebanon, Indiana in an adjacent county which was designed to be a vertically integrated Customer Center. In April, 1997, Macmillan informed distribution employees that in the summer it would announce wage increases that would be effective in January, 1998, when the Customer Center opened.

In June, 1997, the Union of Needletrades, Industrial and Textile Employees (Union) filed a petition with the National Labor Relations Board (NLRB) to represent employees at the

two Indianapolis distribution facilities. After an evidentiary hearing, the NLRB's Regional Director designated the appropriate bargaining unit as warehouse and distribution center employees at the Northwest Boulevard and Rockville Road facilities, including its two primary classifications, picker/packers and stocker/truckers. On August 1, 1997, Macmillan announced the wage increases that employees would begin receiving when they moved to the Customer Center.

B. Campaign Communication About Collective Bargaining.

Before the election, the Union and Macmillan campaigned vigorously and communicated with employees in writing and verbally. One topic they addressed was collective bargaining and its potential impact on wages and benefits.

1. The Union's literature.

The Union distributed multiple pamphlets which predicted Macmillan would say bargaining started "from scratch", informed employees that bargaining started from what they currently had, and told employees "when you negotiate a first contract, you start with the pay and benefits you have now and build on them." Five days before the election, internal union organizers secured a written opinion from the Union's lawyer addressing the consequences of a Union victory on the employees' January wage increases. The letter told employees that if the Union lost, Macmillan could decide not to implement the increases. It also informed employees that if the Union won, Macmillan could not refuse to implement the increases and, if it did, that would be unlawful. Union supporters sought to share this letter with co-workers.

2. The Company's literature.

Macmillan distributed a leaflet entitled "Collective Bargaining It's a Huge Gamble," which stated that benefits and

wages could be reduced through the bargaining process. The Company told employees that the law required it to bargain in good faith and posed the following:

> Question: The Union has told us that collective bargaining means we "start with the wages and benefits we now have and build on them." Is that true?
>
> Answer: No! In the "horse-trading" process of collective bargaining, it is possible that wages and benefits could be affected, either positively or negatively. . . .

The text of the other leaflet the Company distributed about bargaining stated:

WHAT DO YOU HAVE TO LOSE?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week
x 13 weeks =	x 39 weeks =
$572.00 in Jan - Mar	$1,950.00 Apr - Dec

For a total of $2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package would be.

WHY TAKE THE RISK?
VOTE NO!

The $1.10 and $1.25 mentioned were the amounts of the previously announced increases effective upon moving to the Customer Center.

3. The Company's related verbal communications.

Macmillan's President told employees in large group meetings they would get the announced increases regardless of whether the Union was voted in or not, that the Company would negotiate in good faith and that their current benefits would be the point where negotiations began and could go up or down.

The Human Resource (HR) Manager told employees in one series of meetings: "There are no guarantees that the current benefits that the Company has will be your benefits after negotiations. Your current benefits are merely a starting point and they could go up or down as a result of negotiations." In another series of meetings, he told employees:

> The Union has told the employees at Macmillan that the collective bargaining process means that things can only go up or get better as a result of collective bargaining. That's their promise, but that's <u>not</u> the reality. Far too many workers in America have found out that the collective bargaining process means you start with what you have now when you begin bargaining, but at the end of the bargaining process, individual items that were negotiated can be increased or decreased.

A Union witness present at one of the meetings testified that the HR Manager said employees could lose benefits, everything would be on the table and the parties would negotiate from there. She further testified that he said employees could lose what they had in negotiations.

The HR Manager also was called into a small meeting after an employee announced in the meeting that Macmillan's

President told employees they would get the increases regardless of whether the Union was voted in or not. A Union witness testified that the HR Manager stated he did not believe they would because negotiations started at zero or from scratch. The HR Manager also said, however, that if the Company had committed to wage increases, they would be part of the baseline and beginning point for negotiations.

C. Objection To The Company Leaflet, The Rerun Election And Appeals.

The Union lost the election and filed objections to Macmillan's campaign conduct. Without a hearing, the NLRB's Regional Director sustained an objection based solely on Macmillan's "What Do You Have to Lose" leaflet, overturned the election and ordered a re-run election.

In January, 1998, Macmillan consolidated the two Indianapolis distribution operations into the new Customer Center in Lebanon. The NLRB held the rerun election in June, 1998, which the Union won by a swing of three votes, and the NLRB certified it as the bargaining representative for the originally designated unit. To challenge the underlying certification, Macmillan declined to bargain, and in October, 1998, the NLRB ordered it to bargain. Macmillan filed a Petition for Review with the Court of Appeals arguing, *inter alia*, that the leaflet was protected by Section 8(c) and the First Amendment. The NLRB cross-petitioned for enforcement. In November, 1998, Pearson, Inc., a British company, bought Macmillan.

In November, 1999, the Court of Appeals granted the Company's Petition for Review and remanded the case, finding that the Regional Director's decision was the "antithesis of sound reasoning" and the principle upon which he relied did not, and could not, exist in "light of the First Amendment." (App. 48a-49a).

D. The Subsequent Hearing And Appeals.

In June, 2000, an Administrative Law Judge (ALJ) held an evidentiary hearing on the Union's objections to the first election. Pearson, the new owner, filed a motion with the ALJ challenging the continued appropriateness of the unit in view of numerous significant changed circumstances. In December, 2000, the ALJ found the leaflet was unlawful because it mischaracterized the law and advised employees they risked losing the raise if the Union won because everything would be negotiable. (App. 37a). He also denied Pearson's motion challenging the continued appropriateness of the unit. (App. 42a).

In October, 2001, the NLRB affirmed and ordered Pearson to bargain. In November, 2001, Pearson filed with the NLRB a Motion for Reconsideration and to Reopen the Record or for Rehearing on the Current Appropriateness of the Unit. In August, 2002, the NLRB, by a 2-1 vote, denied that Motion. (App. 12a-18a). Pearson then filed a Petition for Review of those decisions arguing, *inter alia*, the leaflet was a lawful communication and also that, at a minimum, the Board should have held a hearing on the significant changed circumstances issue and taken evidence. The NLRB cross-petitioned. On July 6, 2004, the Court of Appeals enforced the NLRB's cross-petition finding that the leaflet was a threat and a basis to overturn the first election. It rejected Pearson's arguments on changed circumstances.

E. Changed Circumstances Since The Regional Director Designated And Certified The Bargaining Unit.

Since the Regional Director's designation of the bargaining unit and the two elections, numerous changed circumstances of a substantial nature occurred.

1. Change in Company ownership and management.

Macmillan was a subsidiary of Viacom, a publicly traded U.S. corporation, headquartered in Indianapolis and its facilities reported through a management structure located in Indianapolis. In November of 1998, it was sold and became a wholly owned subsidiary of Pearson Education, Inc., a subsidiary of Pearson, Inc., a British corporation. The Customer Center then reported through the Pearson management structure located in New York and New Jersey and a Pearson management team is in place. As the Customer Center expanded, its management team did also. As of November, 2001, there were 30 members of the Pearson management team at the facility.

2. Expansion of products and doubling of Customer Center.

Beginning in November, 1998, the Customer Center handled not only the former Macmillan products, but multiple products of Pearson Education, Prentice Hall Direct, Financial Times, Addison-Wesley, Prentice-Hall School Division, and Pearson Technical Reference. Additionally, the Customer Center originally comprised approximately 545,000 square feet, but in September, 2001, Pearson completed construction of an additional 500,000 square feet.

3. Consolidation of numerous operations from other states at the Customer Center between 1998 - 2001.

In 1998, Macmillan relocated the Customer Service, Order Entry, Reconciliation, Accounts Receivable, Credit Collections and Inside Sales to the Customer Center from other locations in Indianapolis. It also relocated digital material distribution operations from New Jersey to the Customer Center. Assembly operations that had been outsourced were then brought in-house at the Customer Center.

After Pearson became owner, it continued to consolidate multiple operations from elsewhere to the Customer Center. In 1999, Pearson relocated operations from Orangeburg, New York; from West Nyack, New York; from Pennsylvania; and other operations from Indianapolis. In 2000 and 2001, Pearson relocated additional operations to the Customer Center, including operations from Indianapolis, operations from Pinola, Indiana, and more operations from West Nyack, New York. Pearson also acquired a company in Chicago and relocated those operations to the Customer Center.

4. Doubling of the workforce.

In August, 1997, approximately 200 Macmillan employees worked at the two Indianapolis distribution centers. In June of 1998, there were approximately 280-300 Macmillan employees at the Customer Center. As of November, 2001, there were over 600 Pearson employees working there. Only 52 of the original 160 eligible voters working for Macmillan in August, 1997 continued to work for Pearson at the Customer Center as of November, 2001, and only 62 remained from the June, 1998 eligible voters.

5. New job classifications, cross-training, equipment, and processes.

Under Pearson, the Customer Center has different and additional job classifications including material handler, equipment operator, mechanics and clerks. There was no cross-training of distribution employees and support employees by Macmillan. Pearson cross-trains distribution employees and support service employees so that they can assist in peak business periods.

Wire guidance systems, turret trucks, new and faster conveyor systems, cold seal machines, bar code generators, automated shipping sorters, low profile pallet wrappers, trash conveyors and mirrored lines were not used at the

Indianapolis distribution facilities. All of these higher tech pieces of equipment are used at the Customer Center. A "pick to light" system was not used at the Indianapolis facilities. This newer higher tech system is used at the Customer Center.

REASONS FOR GRANTING THE PETITION

Under Supreme Court Rule 10, a Petition for Writ of Certiorari is appropriate when a United States Court of Appeal decides an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court. The Court of Appeals' decision in this case raises important questions of constitutional and federal labor law about the interplay between the First Amendment and Section 8(c) of the National Labor Relations Act. The emergence of a global economy and declining membership have led to increased emphasis by labor unions on trying to organize employees across the Country. It is in the interests of unions, employers, the employees they both seek to persuade and national labor policy, that the Court clarify the standards to be applied and the limits on the Board's ability to infringe on First Amendment protections. This case also raises important questions of federal labor law as to the rights of employees under Section 7 of the National Labor Relations Act when there have been significant changed circumstances since a bargaining unit was designated and certified but before final resolution of the parties' legal obligation to bargain in that unit. The Court's review is warranted for the following reasons:

1. This case raises the important constitutional question of whether the National Labor Relations Board violates an employer's First Amendment rights when it interprets a written communication made by the employer during a union organizing campaign to be a threat when each of the statements contained in that communication are true and otherwise lawful.

Thirty-five years ago, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), this Court recognized that Section 8(c) of the National Labor Relations Act ("Act") implements the First Amendment into that statute and that employers have a firmly established right to communicate views to employees which cannot be infringed by a union or the National Labor Relations Board ("NLRB" or "Board"). The one narrow restriction on an employer's free speech is that the communication cannot be a threat of reprisal or force or promise of benefit. *Id.* at 618. Thus, the Board's regulatory authority over speech is limited to cases where an employer's communication is a threat of reprisal or coercion. *Allentown Mack Sales and Serv. v. NLRB*, 522 U.S. 359, 386 (1998) (Rehnquist, C.J., dissenting).

Because campaigning by unions and employers during a organizational drive is often vigorous and responsive to one another, Section 8(c) is intended to encourage and allow a wide latitude of debate. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966) ("[C]ases involving speech are to be considered against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open . . . ."); *see also Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech . . . goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the

choices available."). Indeed, even misstatements and mischaracterizations of the law have long been held not to be unlawful campaign conduct. *Carry Co. of Illinois, Inc.*, 310 NLRB 860 (1993); *Metropolitan Life Ins. Co.*, 266 NLRB 507 (1983); *Midland Nat'l Life Ins. Co.*, 263 NLRB 127 (1982). In this important area, the Board's construction of the Act is not entitled to deference if its interpretation raises questions of validity under the First Amendment. *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-577 (1988). This is just such a case.

Employers and unions try to educate employees on advantages and disadvantages to unionization so they can make an informed decision. It is well settled that an employer is free to communicate the potential risks and downsides of unionization, and references to those risks and possible negative outcomes of unionization do not deprive its campaign statements of their legitimacy. *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174 (D.C. Cir. 1998) (citing *UARCO, Inc.*, 286 NLRB 55, 58 (1987)). One of those risks is the unpredictability of the collective bargaining process on wages and benefits the employer already provides.

Collective bargaining is almost always a focus of communications during a union organizing campaign. Employees often mistakenly believe that, when collective bargaining begins, they start with what they have and negotiations can only go one way - up. A no lose proposition. The law, however, is clear that through the collective bargaining process, existing wages and benefits (i.e., the employees' status quo) can go up, can go down, or be eliminated and that an employer is allowed to inform employees of that risk. *Coach & Equip. Sales Corp.*, 228 NLRB 440, 441 (1977) (It is legitimate to tell employees that collective bargaining is potentially hazardous and as a result of negotiations, they might possibly wind up with less after unionization than

before.); *Stumpf Motor Co., Inc.*, 208 NLRB 431, 432 (1974) ("An employer is free to indicate to his employees what the possible result of bargaining may be, and to call their attention to the possibility or even probability that certain existing benefits may be traded away for others."); *see also Fern Terrace Lodge, Inc.*, 297 NLRB 8 (1989) (Employer has as much right to ask for wage reductions as a union has to ask for increases.). As long as the risk of loss is tied to the collective bargaining process, the communication is lawful. It is only when that risk is not communicated in the context of collective bargaining that statements are threats. *Lear-Siegler Mgmt. Serv. Corp.*, 306 NLRB 393 (1992); *So-Lo Foods, Inc.*, 303 NLRB 749, 750 (1991), *aff'd* 985 F.2d 123 (4th Cir. 1993); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *aff'd* 679 F.2d 900 (9th Cir. 1982).

Here, the Macmillan employees' status quo included their then current wage rates plus the earlier announced wage increases effective in January. Macmillan's leaflet stated that wage increases might be at risk because no one could tell what the final wage package would be after the collective bargaining process ended. The statement is true and describes the law. It is no different than if Macmillan had stated "What do you have to lose? How about some of your existing wages and benefits because everything is negotiable and no one knows what the final outcome will be." This latter statement is clearly protected by the First Amendment.

The Board and the Court of Appeals, however, interpreted the leaflet to be a threat of reprisal by Macmillan to deny employees the increases if they voted for the Union and require the Union to bargain the increases back. That conclusion read into the leaflet something it did not state. Otherwise lawful statements do not become unlawful merely because they have the effect, intended or otherwise, of causing employees to abandon their support for the union. *Lee Lumber and Bldg. Material Corp.*, 306 NLRB 408, 409-

10 (1992), *aff'd* in part, *rev'd* in part, 117 F.3d 1454 (D.C. Cir. 1997); *see also*, *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) (The mere fact that campaign propaganda may induce fear does not deprive it of the protection of Section 8(c). That is often the nature of campaign propaganda.).

A threat of reprisal is a statement by the employer, that it will take some specific adverse action against employees in retaliation for the employees voting for Union representation. *NLRB v. Golub Corp.*, 388 F.2d 921, 928 (2nd Cir. 1967) (a threat is if an adverse consequence will be "deliberately inflicted in return for an injury—to return evil for evil"). Macmillan's leaflet did not say that. The leaflet did *not* say that if the Union won, Macmillan would withhold or refuse to give the already committed wage increases, nor did it state that Macmillan would only give the wage increases if the Union was able to negotiate them back. Instead, the leaflet said Macmillan would be free to give the wage increases if the Union lost - a true and otherwise lawful statement. It also said that if the Union won, no one would know whether the employees' wages (which included the already announced January increases) would remain at those levels after negotiations were concluded—also a true and otherwise lawful statement. *Tech. Serv. Solutions*, 332 NLRB No. 100 at 20-21 (2000) (in reference to an announced pay raise, the employer stated, "[d]epending on the negotiations, I don't know whether you will keep it or not; . . . that will be up to union negotiations." The ALJ held that was "not a threat but an accurate description of an unpredictable process . . . .").

Communication in a leaflet of independent, accurate and otherwise legal statements about the status quo of a wage package and the risk of unpredictability of a final wage package due to the collective bargaining process, is protected by Section 8(c). *NLRB v. Herman Wilson Lumber Co.*, 355 F.2d 426, 431-432 (8th Cir. 1966) (citing *Texas Industries, Inc. v. NLRB*, 336 F.2d 128 (5th Cir. 1964)) (An employer is

a rightful contestant for his employees' loyalty in a union election. Section 8(c) permits an employer to state his legal rights under the Act and to predict that dire economic consequences will follow from union victory. Inasmuch as the Company did not state anything more than its legal rights, the challenged remarks fall within Section 8(c)). This Court should clarify the standard to be applied in this important area.

2. This case raises the important constitutional issue of whether the National Labor Relations Board infringes on an employer's First Amendment rights when it interprets a single communication, that is but one part of a continuum of communications on the same issue, in isolation, or is it required to consider that communication in context with other communications on that same subject before determining that it is a threat and not protected speech.

In addition to being robust and partisan, pre-election campaigns extend over a period of weeks and often include multiple communications by unions and employers on a common topic. Before interpreting a single leaflet, that is but one piece of that communication continuum, as a threat, the Board should be required under the First Amendment to analyze the challenged communication, not in a total vacuum, but rather, interpret it in context and with other surrounding related communications made by the union and the employer. Those related communications give the challenged communication context when deciding the important and fundamental issue of whether it is protected by the breadth of the First Amendment or is one that falls into the very narrow prohibition of a threat under Section 8(c), particularly if it could be viewed two different ways. In this instance, however, despite the fact there were multiple related communications from both the Union and the Company on collective bargaining, the Board and the Court based their

decision solely on the four corners of the leaflet which was but one piece of the relevant communication continuum.

Totally ignored was the important evidence that Macmillan's President had assured employees in large group meetings that the Company would give the wage increases whether the Union won or not and would bargain in good faith as well as the HR Manager's statement that if the President had committed to a wage increase, it would be part of the baseline from which negotiations started. Those important directly related comments, taken together with the leaflet, give it context and show not a threat, but confirmation that employees would receive the wage increase and what happened to employees' final wages after that would depend on the risks inherent in the give and take of collective bargaining. *See UARCO, Inc.*, 286 NLRB 55, 58 (1987) (Bulletins contained no expressed threats of any kind nor any falsehoods. When considered in proper conjunction with the company's oral assurances that it would bargain and bargaining could go up or down, the literature had no reasonable tendency to coerce.).

Also ignored was the significant evidence that just days before, the Union obtained an opinion letter from its lawyer telling employees that if the Union lost, Macmillan could refuse to give the already announced wage increases. Macmillan's leaflet responded to that comment by stating it would be free to give the increases. Further ignored was the significant fact that in that same letter, the Union's lawyer assured employees that Macmillan could not refuse to give the increases if the Union won because it would be unlawful. That gives highly relevant context to the leaflet. Macmillan was making a counterpoint directly to the Union's comment by reminding employees what it previously had told them - namely, their final wage rates ultimately would be determined by the unpredictable collective bargaining process. The failure to even consider this important contextual evidence

when assessing whether the leaflet was a threat, violated the Company's First Amendment rights.

As aptly stated in *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1140 (D.C. Cir. 1994),

> "If the Board may take management statements that very emphatically assert a risk, twist them into claims of absolute certainty, and then condemn them on the ground that as certainties they are unsupported, the free speech right is pure illusion. To be sure, Crown could have expressed the probable impact . . . more cautiously. But if unions are free to use the rhetoric of Mark Antony while employers are limited to that of the Federal Reserve Board Chairman, again the employer's speech is not free in any practical sense."

This Court should clearly define the role context and related communications should play when balancing First Amendment rights with an isolated communication alleged to be a threat under Section 8(c) of the Act.

3. **This case also raises an important issue of federal labor law under the National Labor Relations Act that this Court has not addressed in 50 years or since its *Gissel* decision. In a non-*Gissel* bargaining order case, what effect should significant changed circumstances that have occurred since the bargaining unit was originally designated and certified, years earlier, but before final resolution of the parties' obligation to bargain in that unit, have on continued appropriateness of that unit and on the Section 7 self determination rights of all current employees, who had no opportunity to exercise that right?**

The voting unit designated by the Board after an evidentiary hearing, and later certified by it, was premised on the facts and circumstances existing at the two Indianapolis distribution centers in June, 1997. Macmillan, and then

Pearson, exercised appeal rights challenging the Board's decisions. In 1999, the Court of Appeals granted Macmillan's Petition for Review and remanded the case. In 2000, the Board held an evidentiary hearing on the Union's objections to the 1997 election. At that hearing, Pearson (having purchased Macmillan two years earlier) made a motion raising the issue of continued appropriateness of the unit in view of significant and numerous changed circumstances and sought to offer evidence in support. The ALJ denied Pearson's motion and the Board perfunctorily, and without analysis, affirmed in a footnote. (App. 23a) Pearson then moved the Board for rehearing and to reopen the record on changed circumstances and continued appropriateness of the unit. The Board, by a vote of 2 to 1, denied Pearson's motion. (App. 12a-18a). The Board and Court indicated that some of the changed circumstances cited by Pearson were only relevant in Gissel bargaining order type cases. (App. 10a).

In other non-*Gissel* situations, changed circumstances can result in certified bargaining units being no longer appropriate. *See e.g.*, *Kelley Bus. Furniture, Inc.*, 288 NLRB 474 (1988) (certified unit no longer appropriate after employer consolidated multiple operations to single location); *Ramada Beverly Hills*, 278 NLRB 691 (1986) (significant changes resulted in substantial centralization of administration and operations); *St. Bernadette's Nursing Home*, 234 NLRB 835 (1978) (employer's refusal to bargain with certified union not a violation of the Act because of changed circumstances after the union was certified); *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973) (unit no longer distinct due to changed circumstances).

Pearson proffered evidence of significant changed circumstances that were multiple in both number and variety, over a four plus year continuum, and included change in geographic location, change in ownership, change in management, change in job classifications, change in human resources,

change in products handled, change in methods, changes in workforce size and complement; doubling in size of the facility, etc. Dissenting Board Member Hurtgen correctly recognized Pearson should have been allowed a hearing and an opportunity to introduce evidence about changes because the unit certified several years earlier was for two facilities in Indianapolis, and circumstances may have so changed as to not support a bargaining order for current Pearson employees in Lebanon. (App. 17a-18a). Those changed circumstances justified a hearing to allow analysis of whether a previously designated and certified unit remains appropriate such that a union should be imposed on current Pearson employees at Lebanon who had no say. *Renaissance Ctr. P'ship.*, 239 NLRB 1247 (1979) (employees in certified unit were subsequently consolidated with another group of employees that had been readily distinguishable prior to consolidation—new election ordered to determine whether consolidated group desired union representation).

By rejecting the changed circumstances issue and declining to hold a hearing, the Board is imposing a union on hundreds of current Pearson employees at the Customer Center in Lebanon, the vast majority of whom have never had the opportunity to exercise their Section 7 statutory right to choose or not choose union representation. The purpose of the National Labor Relations Act is to establish individual employee rights under Section 7, including the important right of self-determination. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 US 50, 61-62 (1975) (Section 7 affirmatively guarantees employees the most basic rights of industrial self determination); *see also*, *Lechmere, Inc. v. NLRB*, 502 US 527, 531-32 (1992) (by its plain terms, the NLRA confers rights only on employees); *Pattern Makers' League of N. Am., AFL-CIO v. NLRB*, 473 US 95, 116 (1985) ("[T]he employees' rights under [Section] 7 include . . . the right to refrain from joining or assisting a labor organization . . . .") (White, J., concurring). In fact, our

Nation's labor policy is founded on this right of employee self determination. *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996).

Fifty years ago in *Brooks v. NLRB*, 348 U.S. 96, 104 (1954), this Court held that an employer presented with evidence shortly after a union won a representation election, that a majority of its employees did not want the union, still was required to recognize and bargain with the union for a 12-month period after certification, absent unusual circumstances. However, the Court has not addressed changed circumstances since then, nor since development of the law under its 1969 decision in *Gissel*, and not in a case involving a seven-year time span.

In *Gissel*, *supra*, this Court first recognized that a bargaining order can be an appropriate remedy against an employer who has committed significant unfair labor practices. Since then numerous courts of appeal have recognized that in *Gissel* cases changed circumstances must be taken into account as to the appropriateness of imposing the bargaining order. *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171 (D.C. Cir. 1998); *Charlotte Amphitheater Corp.*, 82 F.3d at 1078 (recognizing at least eight circuits agree); *Harper Collins San Francisco v. NLRB*, 79 F.3d 1324, 1332-33 (9th Cir. 1996); *Impact Industries, Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1998). The reason it is important for courts to look at changed circumstances in *Gissel* bargaining order cases is because there is an "obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of the current ones to decide whether they wish to be represented by a union." *Charlotte Amphitheater Corp.*, 82 F.3d at 1078. *See Harper Collins*, 79 F.3d at 1333 (effect could be to impose upon current employees a union not desired by a majority of them).

While this is not a *Gissel* bargaining order case, that very same danger and rationale exist here. There have been significant changed circumstances over the course of a number of years since the time the Board designated and certified the unit of distribution employees at Rockville Road and Northwest Boulevard in Indianapolis. If the bargaining order is enforced, a vast majority of current Pearson employees at the Lebanon Customer Center will have a union imposed upon them without ever having been given the opportunity to exercise their Section 7 right of self determination.

This Court has not addressed the appropriate consideration and effect of changed circumstances in a non-*Gissel* case since *Gissel*, or in a case involving a time span of almost seven years between designation/certification and legal resolution, and it is an important issue of federal labor law. The standards to be applied under the Act in resolving the tension between the fundamental right of employee self determination guaranteed by Section 7 (upon which our national labor policy is premised) and the enforcement of bargaining orders in circumstances such as these should be defined.

CONCLUSION

For all the reasons articulated above, Pearson Education prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1266

Consolidated with 02–1324

PEARSON EDUCATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNION OF NEEDLETRADES, INDUSTRIAL AND
TEXTILE EMPLOYEES,
Intervenor.

Argued September 16, 2003

Decided July 6, 2004

On Petition for Review and
Cross-Application for Enforcement of an
Order of the National Labor Relations Board

Gregory J. Utken argued the cause and filed the briefs for petitioner.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert J. Englehart, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Arthur F. Rosenfeld*, General Counsel, *John H. Ferguson*, Associate General Counsel, and *Aileen A. Armstrong*, Deputy Associate General Counsel. *James M. Oleske*, Jr., Attorney, entered an appearance.

Barry A. Macey argued the cause and filed the brief for intervenor.

Before: SENTELLE, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Pearson Education, Inc., ("Pearson" and "the company") petitions for review of the National Labor Relations Board ("the Board'' or "NLRB") decision following our remand in Macmillan Publishing Co. v. NLRB, 194 F.3d 165 (D.C. Cir. 1999). After remand, the Board reaffirmed its initial decision setting aside the first election then certifying the Union of Needletrades, Industrial and Textile Employees of the AFL–CIO ("the union") as the collective bargaining agent based on a second, otherwise uncontested, election. Pearson refused the union's demand for bargaining. The Board entered a bargaining order. Pearson now petitions for review, and the Board cross-petitions for enforcement of its order. For the reasons more fully set out below, we deny the company's petition for review and allow the Board's cross-petition for enforcement.

I. Background

Pearson distributes and sells reference materials and educational books. In 1997, the company—then Macmillan Publishing, Inc.—operated two distribution warehouses in Indianapolis: one at Northwest Boulevard and one at Rockville Road. In June of that year, the union petitioned the Board to represent "all full-time and all regular part-time warehouse and distribution center employees" at both facili-

ties. Because the company planned to consolidate and transfer its operations to Lebanon, Indiana, it argued that holding an election would not effectuate the purposes of the National Labor Relations Act ("the Act"). The NLRB's Regional Director found that the intended relocation did not render an immediate election inappropriate and ordered an election.

The Board denied the company's Request for Review of the Regional Director's Decision and Direction of Election. The union held the election in August. The initial results revealed a sufficient number of challenged ballots to affect the results of the election, and the Regional Director ordered that a hearing be held to resolve the status of the challenged ballots. While the election's outcome was unknown, the union filed eight objections to the election and the company filed four. The Regional Director shelved these objections pending determination of the election's outcome.

Two weeks prior to the first election, the company had announced an hourly-wage increase of $1.10—and later $1.25—in connection with the move to Lebanon. One week before the election the company distributed a leaflet stating:

> WHAT DO YOU HAVE TO LOSE? How about: $2,522.00 next year! . . . Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move. With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final package would be. WHY TAKE THE RISK? VOTE NO! (emphasis in the original).

When the company won the election by three votes, it withdrew its objections and the Regional Director—without passing on the rest of the union's objections—found that the company had circulated an improper leaflet to employees. The union claimed the flyer "threaten[ed] employees with the loss of the promised wage increase . . . if they selected the union as their bargaining representative."

The Regional Director sustained this objection. He explained that during a union campaign, "an employer should decide the question of granting or withholding benefits as it would if a union were not in the picture." Further, he stated that the leaflet "violates this principle by leaving it in the minds of the employees that they will lose the previously announced raise . . . if the union is voted in." The Regional Director concluded that the company's "mention, later in the document (in much smaller print) that all wages and benefits are subject to negotiation does not cure the clear implication that the employees will not get their promised raise if the union is voted in." The Board denied the company's request for review of the Regional Director's decision.

The union won the second election in June 1998, by six votes. The company filed objections challenging the Regional Director's previous decision raising issues that had already been reviewed by the Board. The Regional Director denied the objections and certified the union as the collective bargaining representative. The Board again denied the company's request for review of the Regional Director's decision.

After the Board certified the union, the company refused to bargain or provide the union with requested information. The union charged that the company was engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1). On October 30, 1998, the Board issued a Decision and Order finding that the company had violated the Act as charged.

This Court reviewed the Board's original decision in *Macmillan Publishing Co. v. NLRB*, 194 F.3d 165 (D.C. Cir. 1999). There, the company argued both that the first election was premature, and that the Regional Director improperly overturned the first election because of the flyer.

We held that the company could not successfully challenge the order on the ground that the first election was premature

because of the impending transfer to a new facility. The Board's bargaining order resulted from the second election, which the union won, not the first election, which the union lost. The company's move to Lebanon had already taken place by the time of the second election. Indeed, the Regional Director's predictive judgment before the first election—that the workforce at the old locations would be a substantial and representative complement of the workforce at the new location had proved accurate. *Id.* at 166.

However, we held that the Regional Director's decision to overturn the results of the election—on the basis of the flyer did not rest on sound legal principles, and thus was arbitrary and capricious. *Id.* at 168. Rather than citing to Board authorities discussing the issue of when employer communications during union election campaigns are threatening and coercive, the Regional Director instead relied on the concept that an employer should act as if a union were not in the picture. We held that no such principle governs employer communications during such elections. *Id.*

On remand, the Board ordered a hearing before an Administrative Law Judge ("ALJ") on all of the union's objections to the first election. At the hearing the union stated that it was prepared to go forward on only four of the original eight objections.

After a three-day hearing, the ALJ issued a decision recommending that the Board sustain three of the union's four objections, set aside the first election, and reaffirm the union's certification based upon its success in the second election.

On review, the Board affirmed the ALJ's decision to set aside the results of the first election and—based upon the union's second election victory—reaffirmed its certification of the union and ordered the company to bargain. *Pearson Education, et al.*, 336 NLRB No. 92 (2001) (the "Decision

and Order"). The company moved to reconsider the appropriateness of the bargaining unit, which the Board denied. This petition for review followed.

II. Analysis

A. *The Company's Leaflet*

The company's central claim is that the union's certification was invalid because the Board abused its discretion in setting aside the first election. Indeed, the company does not dispute the outcome of the second election, which the union won.

Therefore, unless the company prevails in its assertion that the Board improperly set aside the results of the first election, the Board's certification of the union was valid and the company's refusal to bargain with the union violates sections 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5) and (1). *See Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 203 (D.C. Cir. 1993); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 881-82 (D.C. Cir. 1988).

Our review of Board decisions is deferential, and we have specifically held that judicial review of a Board decision for a rerun of an election is "extremely limited." *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987) (citation omitted). The legal principles governing the sort of conduct here alleged are clear and well-settled: the Board will sustain an objection to a party's statements or conduct during an election when the challenged actions had a reasonable tendency to interfere with employee free choice. *See NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988). Further, the Board reasonably finds that employee free choice has been compromised when the election is tainted by con-duct or statements that "tended to interfere substantially with the ability of the employees to make a free and rational choice in the election." *General Dynamics Corp.*, 250 NLRB 719, 719

(1980) (citations and internal punctuation omitted). *See also Macmillan Pub'g. Co.*, 194 F.3d at 168.

In sum, the issue before the Board was whether an employer's threats or statements had a reasonable tendency to interfere with the free exercise of employee rights under the Act. *S.W. Reg'l. Joint Bd., Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In our prior review of this case, we found that the Regional Director, whose decision the Board refused to review, did not engage in the required reasoned decisionmaking. We specifically addressed the Regional Director's conclusion that the flyer violated the "principle" that an employer should act as "if a union were not in the picture." *Macmillan Pub'g. Co. v. NLRB*, 194 F.3d at 168. However, as we held, "[t]here is no such principle governing employer communications during election campaigns, and we doubt that there could be in light of the First Amendment." *Id.* Because of this defect, we found that the Board's decision reflected a classic case of lack of reasoned decisionmaking. *Id.* (The "rationale was the antithesis of reasoned decisionmaking, and as such was arbitrary and capricious.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). We hold that this defect has now been cured.

The Board correctly found that the company's leaflet, circulated several days before the election, threatened to withhold a promised wage increase if the union won the election, and set aside the results of the first election. The Board then certified the union as the bargaining representative of the unit employees based on the employees' vote in favor of union representation in the second election. If the Board's decision as to the first election was correct, the second follows without challenge. It was correct.

The settled law is clear: to state that a previously-announced wage increase will probably be lost if a union

wins constitutes employer coercion. *See Flamingo Hilton–Laughlin*, 324 NLRB 72, 111 (1997), enforced in relevant part, 148 F.3d 1166, 1175 (D.C. Cir. 1998). Here, just days after the company announced a ten-percent wage-increase, and just days before the election, the company distributed a campaign flyer that threatened that the increase, amounting to "$2,522.00 next year," was "WHAT . . . YOU HAVE TO LOSE if the Union wins the election." As the Board emphasized, the flyer "explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." We agree with the Board that this constitutes classic coercive conduct. *See Pepsi–Cola Bottling Co.*, 315 NLRB 882, 892–93 (1994), enforced in relevant part, 96 F.3d 1439 (4th Cir. 1996). And petitioner's arguments to the contrary are unavailing.

The flyer states that "[w]ithout a Union, [the Company] will be free to proceed ahead with the announced wage increases for the [upcoming] move," but "[w]ith a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package will be. WHY TAKE THE RISK?" We agree with the Board's conclusion that the language "leaves the clear impression that if the employees choose the union, 'what they may ultimately receive depends upon what the union can induce the employer to restore." As the Board indicated, this is coercive conduct because it "sends the clear message that, in the absence of the Union, the Company is willing to grant the raise, but if the Union wins the election, the Company will pay only what the Union can force it to pay." *See NLRB v. Saunders Leasing System, Inc.*, 497 F.2d 453, 457 (8th Cir. 1974) ("Express threats to bargain from scratch and withdraw benefits during negotiations can carry in themselves their own seeds of coercive threats."); *NLRB v. Aerovox Corp.*, 435 F.2d 1208, 1211–12 (4th Cir. 1970).

A promised raise must be awarded even if a union wins an election. *See Advo System Inc.*, 297 NLRB 926, 940 (1990); *Arrow Elastic Corp.*, 230 NLRB 110, 113, *enforced*, 573 F.2d 702 (1st Cir. 1978). Although the union here could legally bargain away the raise, as the Board emphasized, "that is not what the leaflet says." We agree with the Board's conclusion that "[t]he message of the leaflet is that the Union would have to bargain to get the employees the raise, and this is simply not true."

Because we agree with the Board that the company's distribution of the leaflet was objectionable conduct "independently sufficient to set aside the election," we do not need to reach the additional allegations of objectionable conduct by the company.

B. *Changed Circumstances*

We turn briefly to petitioner's assertion that the Board erred in rejecting its arguments on changed circumstances. The company contends that there are a number of changed circumstances that render the certified unit of "warehouse and distribution center" employees at the Lebanon, Indiana facility no longer appropriate. The company asserts that since the Regional Director originally designated the bargaining unit in 1997, circumstances have changed substantially and dramatically, compelling the result that the unit is no longer appropriate. But with the exception of all but a few, the company's "changed circumstances" were brought to the attention of this Court before, when the company argued that these very same changes required dismissal of any election petition until the company had completed the changes. These changes include incorporation at the Lebanon facility of various satellite operations, changes to work procedure, and changes to technologies used by bargaining-unit employees. We again agree with the Board that the company's alleged changed circumstances are the same ones the company asserted when it argued the prospective changed circum-

stances required dismissal of any election petition until it had completed the changes. And apart from this recycled catalog of superficial differences, changes in ownership and post-election employee turnover are on their own each insufficient grounds to render a certification no longer appropriate.

The company rightly points out that in November 1998, Macmillan was sold to Pearson. However, as the Board noted in denying the company's motion for reconsideration, mere change of employers or of ownership is not such an unusual circumstance as to affect the force of certification by the Board within the normal operative period if the majority of employees after the change of ownership were employed by the preceding employer. The company makes no allegation that only a minority of employees employed in the bargaining unit after the change of ownership had been employed by the company prior to the change.

The company's emphasis on the employee turnover that has occurred since this Court first reviewed and remanded the Board's certification of the union is similarly unavailing. Indeed, as the Board noted in denying the company's motion for reconsideration, "it is well settled that post-election turnover is an insufficient ground to set aside an election." *See Avis Rent-A-Car System, Inc.*, 285 NLRB 1032, 1033 (1987), *enforced mem.*, 849 F.2d 599 (3d Cir. 1988). We have recently held that apart from bargaining orders that arise in the Gissel context, turnover is not something that affects the ongoing validity of Board bargaining orders. *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) ("The simple fact of employee turnover . . . would not, without more, have been enough to require a different decision by the Board.").

Lastly, although the company asserts that since the second election the entire workforce has doubled, it is unclear whether the relevant bargaining unit has changed in size at all. Regardless, even a doubling in the size of the bargaining unit is not the kind of change that alters the ongoing validity

of a Board certification. We thus find no changed circumstances that render the certified unit inappropriate.

III. CONCLUSION

For the reasons set forth above, we deny the petition and uphold the Board's decision sustaining the results of the second election.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 25-CA-26182

PEARSON EDUCATION, INC.
Respondent,

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, MIDWEST REGION, AFL-CIO-CLC
Charging Party.

ORDER DENYING MOTION FOR RECONSIDERATION OR FOR REHEARING

On October 31, 2001, the National Labor Relations Board issued a Decision and Order[1] in this proceeding, finding, among other things, that the Respondent violated Section 8(a) (5) and (1) of the Act by failing and refusing to bargain with the Charging Party. On November 28, 2001, the Respondent filed a Motion for Reconsideration and to Reopen the Record or for Rehearing on the Current Appropriateness of the Unit, asserting that the Board erred in finding the violation above and that the Board should reconsider its finding in light of previously unavailable evidence.

Section 102.48(d)(l) of the Board's Rules and Regulations permits a party in "extraordinary circumstances" to move for reconsideration, rehearing, or reopening of the record after a Board decision or order. We find that the Respondent has

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[1] 336 NLRB No. 92

failed to assert any basis, much less an extraordinary basis, for reconsideration of the Board's order or reopening the record, and we therefore deny the Respondent's motion.

On August 13, 1997, a representation election was held in a unit of warehouse and distribution center employees at two facilities of the Respondent in Indianapolis, Indiana. The tally was 75 votes for and 78 votes against representation. Based on the Regional Director's summary disposition of the Petitioner's objections, a second election was on June 11, 1998, at the Respondent's Lebanon, Indiana facility. The vote was 58 votes for representation and 52 votes against representation. Based on the results of that election, the Board certified the Union. On October 30, 1998, the Board found that the Respondent had violated Section 8(a) (5) and'(1) by refusing to bargain with the Union and, among other things, ordered the Respondent to bargain.[2]

On November 12, 1999, the U.S. Court of Appeals for the District of Columbia granted the Respondent's petition for review and remanded the case to the Board for further consideration of the Union's objections to the first election.[3] On October 31, 2001, the Board found that the Respondent had engaged in objectionable conduct in connection with the first election and reaffirmed the bargaining order based on the Union's certification after the second election.[4]

In support of its motion, the Respondent argues that the certified unit may no longer be appropriate because circumstances have changed "dramatically" since the first election. These changes may briefly but inclusively be summarized as follows.

* In January 1998, five months before the second election, operations at the two Indianapolis facilities were

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[2] 327 NLRB No. 17 (1998) (not reported in Board volumes).

[3] *MacMillan Publishing Co. v. NLRB*, 194 F.3d 165 (D.C.Cir. 1999).

[4] 336 NLRB No. 92 (2001).

moved to the current facility in Lebanon, Indiana, along with all employees involved in distribution and servicing customers and related operations.

* In November 1998, the Respondent was purchased by new owners, which resulted in some changes in the management structure at the Lebanon facility and a consolidation of control over labor relations with some other operations.

* Between 1998 and 2001, the Respondent continued to move various operations to Lebanon, with the result that a wider range of materials are now handled in a larger physical plant.

* The Lebanon facility affords greater opportunities for employee interchange and sharing of facilities than the original locations.

* Since the first election, the Respondent has purchased new and updated equipment for the Lebanon facility and employees at the facility are being cross-trained more than they had been at the previous facilities.

* There has been employee turnover in the unit.

In considering the Respondent's motion, we assume arguendo that each of the above assertions is factually correct. Taken singly or together, however, they are wholly irrelevant to the issue of whether the certified unit of warehouse and distribution employees is not an appropriate unit for bargaining.

The move of the original facilities to Lebanon clearly has no relevance to the continuing appropriateness of the unit, as the second election, on which the certification is based, was held after the move to Lebanon. ownership, the Respondent has raised no issues that require reconsideration of the appropriateness of the unit. "It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the

force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer." *NLRB v. Burns International Security Services*, 406 U.S. 272, 279 (1972) (citations omitted) .

Changes in the size and fittings of the facility, interaction among various categories of employees, and cross-training may indicate that other units could be appropriate for bargaining, but such a showing will not void the duty to bargain with the certified unit. It has long been held that the Act does not require that a bargaining unit approved by the Board be the only appropriate unit, or even the most appropriate unit; it is only necessary that the unit be an appropriate unit. *See, e.g., Boeing Co.*, 337 NLRB No. 24, slip op. at 2 (2001).

Finally, the Respondent's argument that employee turnover has rendered the certified unit inappropriate is without merit, as it is well settled that post-election turnover is an insufficient ground to set aside an election. *Avis Rent-A-Car System, Inc.*, 285 NLRB 1032, 1022 (1987), enfd. 849 F.2d 599 (3d Cir. 1988) (table) ; Action Automotive, 284 NLRB 251, 254-255 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989).

We disagree with our dissenting colleague that we are turning a deaf ear to potentially meritorious arguments by denying the Respondent's motion. To the contrary, we are assuming as true each of the Respondent's factual allegations. As set out above, however, none of the Respondent's averments would, if proved, require a finding that the certified unit of warehouse and distribution employees is not an appropriate unit for bargaining.

Our colleague agrees with us that a showing that other appropriate units may exist is insufficient to demonstrate that the certified unit is not appropriate, but he fails to point to any

of the Respondent's contentions that could, under applicable law, require a conclusion that the certified unit is inappropriate for bargaining. He argues that the issue here is "whether the certified unit (two facilities in Indianapolis) has been so changed as to no longer support a bargaining order for Lebanon." We disagree. As noted above, the certification and the resulting bargaining order are based on the second election, which was held after the Employer had moved the employees at the Indianapolis locations to its new facility in Lebanon. We further note that the Respondent's arguments with respect to the impact of the relocation of the facilities have received full consideration by the Board and the court. See 336 NLRB No. 92, slip op. at 2 fn. 6; see also 194 F.3d at 167 ("[w]e may quickly dispatch the company's argument that the first election was premature because of the impending transfer to the [Lebanon facility]. A s the union rightly points out, the second election . . . led to the Board's bargaining order. By the time of the second election, the company's move to the new facility had already taken place. Of the employees eligible to vote in the second election, 86% had previously worked in the company's two Indianapolis facilities. . . . Nothing more is needed to sustain the Board's order insofar as it rested on the results of the second election") (citation omitted).

As the Respondent has failed even to allege evidence that would, if credited, justify the relief requested, reopening the record would be futile, and would do no more than delay realization of the employees' Section 7 right to a representative of their choosing. The changes that the Respondent has alleged are no different in nature or extent than one would normally expect to occur with the passage of time. If changes of this sort were sufficient to warrant finding a unit inappropriate, then unit determinations would be rendered so ephemeral as to be pointless, and certifications of representative would be illusory.

Accordingly, the Board having duly considered the matter,

IT IS ORDERED that the Respondent's motion is denied as lacking in merit.[5]

Dated, Washington, D.C., August 1, 2002.

Wilma B. Liebman, Member
William B. Cowen, Member
National Labor Relations Board

CHAIRMAN HURTGEN, dissenting.

I would grant Respondent-Employer's motion for reconsideration.

In a pre-election hearing held in 1997, the Employer contended that the petition should be dismissed because of an imminent relocation and consolidation of operations, planned for January 1998. The Board rejected the contention, and the election was held in August 1997.

The Union lost that election. However, pursuant to Union objections, a second election was held in June 1998. The Union won the second election and was certified. In the "technical" Section 8(a)(5) case, the Board ordered the Employer to bargain. On review, the D.C. Circuit rejected the Employer's argument concerning the issue of whether the first election should have been held. The court noted that the bargaining order rested on the second election of June 1998, i.e., after the consolidation. However, the court remanded for a hearing on the issue of whether the first election was properly set aside.

The hearing was held in June 2000 and the Board reaffirmed its prior decision, It ordered the Employer to bargain, notwithstanding the relocation and consolidation. The Employer now seeks reconsideration of that order.

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[5] Member Cowen did not participate in the underlying case and he expresses no views regarding the Board's decision. However, he agrees that the Respondent has not set forth any extraordinary circumstances warranting the Board's reconsideration of its decision.

I would hear the Employer's evidence. The certified unit consisted of two facilities in Indianapolis, Indiana. The unit is no longer at those facilities. It is in Lebanon, Indiana (17 miles away), and it is allegedly a different operation in many respects. I would not turn a deaf ear to the facts concerning the relocation, consolidation and other claimed differences. The last hearing in this case occurred in June 2000. Almost two years have since passed. I would permit the Employer to adduce evidence as to changes occurring since that time. In light of that evidence, the certified unit may have so changed as to no longer support the bargaining order.

My colleagues find that the Respondent's contentions could not require a conclusion that the originally certified unit is inappropriate, and they reject the idea that changes of the sort alleged by the Respondent are sufficient to warrant a finding that the current unit is inappropriate. The issue, however, is neither of the above.[6] Rather, the issue is whether the certified unit (two facilities in Indianapolis) has been so changed as to no longer support a bargaining order for Lebanon.[7]

Finally, the D.C. Circuit has not resolved the issue. It ruled only that it was appropriate to hold the election of June 1998, i.e., after the consolidation. It did not pass on the issue of whether subsequent changes rendered a bargaining order inappropriate.

Dated, Washington, D.C., August 1, 2002.

Peter J. Hurtgen, Chairman
National Labor Relations Board

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[6] Thus, for example, an RC petition for the Lebanon unit might well be processable.

[7] Although the second election was held after the move to Lebanon, the critical fact is that the unit continued to be described as the Indianapolis unit, and the certification reads the same way. These descriptions are no longer accurate.

APPENDIX C

Pearson Education, Inc., and Union of Needletrades, Industrial and Textile Employees, Midwest Region, AFL-CIO-CLC

Case 25-CA-26182

October 31, 2001

DECISION AND ORDER

BY *Chairman* HURTGEN and *Members* LIEBMAN and WALSH

On December 29, 2000, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent, Pearson Education, Inc., filed exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs in opposition to the Respondent's exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below.

On August 13, 1997, a representation election was held among the Respondent's "full and regular part-time warehouse and distribution center employees." The Charging Party Union lost the election. The Regional Director for Region 25, however, set aside the election based on the Charging Party's Objection 2, one of eight objections filed by

the Charging Party.[1] The Board ordered a new election, held on June 11, 1998, which the Charging Party won.

The Respondent subsequently refused to recognize and bargain with the Charging Party. On October 30, 1998, the Board issued an order finding that the Respondent's refusal violated Section 8(a)(5) and (1) of the Act and directing the Respondent to recognize and bargain with the Charging Party.[2] The Respondent filed a petition for review of the Board's Order in the United States Court of Appeals for the District of Columbia Circuit. The court granted the Respondent's petition and remanded the case to the Board for further consideration.[3] In response, the Board ordered that a hearing be held before an administrative law judge to consider all eight of the Charging Party's original election objections to determine whether the first election was properly set aside. We now consider the judge's recommended decision.[4]

Revisiting the Charging Party's Objection 2, the judge found that the Respondent's distribution of the leaflet threatening withdrawal of a promised wage increase, just days before the election, was objectionable and independently sufficient to set aside the election. We agree for the reasons set forth by the judge. As the judge found, the leaflet "explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." As such, it

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[1] Objection 2 alleged the Respondent distributed a leaflet threatening to withdraw a promised wage increase if employees selected union representation. Neither the Regional Director nor the Board reached seven additional objections filed by the Charging Party.

[2] 327 NLRB No. 17 (1998) (not reported in Board volumes).

[3] Macmillan Publishing Co. v. NLRB, 194 F.3d 165 (D.C. Cir. 1999).

[4] The Charging Party withdrew four of its objections and the judge did not make a finding on a fifth objection (Objection 1). Therefore, the judge passed on three objections, which he had renumbered Objections 2, 3, and 4. Renumbered Objection 2 is the same Objection 2 considered in the Board's prior decision.

"clearly interfered with the [employees'] exercise of free choice" in the election. *See, e.g., Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), enfd. in pertinent part 148 F.3d 1166 (D.C. Cir. 1998) (threatened withdrawal of promised wage increase "is a heavy suppression" of Sec. 7 rights).[5]

The judge also sustained the Charging Party's Objection 3. Objection 3 alleged that the Respondent engaged in impermissible electioneering by displaying an anti-union poster near the polling area on the day of the election. The judge found the poster objectionable, relying on *Peerless Plywood Co.*, 107 NLRB 427 (1953), which prohibits captive-audience campaign speeches within 24 hours of an election. The *Peerless Plywood* rule, however, does not apply to posters or other campaign literature. *Id.* at 430; *Myrna Mills, Inc.*, 133 NLRB 1740, 1743 (1961). Nevertheless, we agree with the judge's conclusion that the poster was objectionable.

In evaluating allegations of objectionable electioneering, the Board considers a number of factors to determine whether the conduct reasonably tended to interfere with employee free choice. Those factors include the nature and extent of the electioneering, whether it was conducted by a party to the election or by employees, whether it was conducted in a designated "no electioneering" area, and whether it was contrary to the instructions of the Board agent. See *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118–1119 (1982), enfd. 703 F.2d 876 (5th Cir. 1983).

Applying the *Boston Insulated* factors to this case, we find the poster objectionable. First, the Respondent itself put up the poster. Second, with respect to the nature and extent of the electioneering, the poster was approximately two feet b y three feet and depicted a list of strikes in which the Charging Party had engaged over the last several years. Third, the

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[5] Chairman Hurtgen, in agreeing with his colleagues' disposition of this case, finds it unnecessary to pass on Objections 3 and 4.

poster was hung within an area curtained off for the election—an area every employee had to pass in order to vote. Although the parties failed to designate this area as a formal "no electioneering" area, the poster clearly was located in the "customary area at or near the polls"; thus, it was in the equivalent of a no-electioneering area. *See Bally's Park Place, Inc.*, 265 NLRB 703 (1982). Fourth, while the Board agent did not prohibit posters at or near the polls, Union Representative Cronin expressly warned the Respondent prior to the opening of the polls that the Charging Party considered the poster objectionable. Based on our consideration of these factors, we agree with the judge that the poster was objectionable.

Finally, the judge also sustained the Charging Party's Objection 4, which alleged that the Respondent engaged in objectionable conduct by threatening employees that negotiations would "start at zero" if they selected union representation. For the reasons stated by the judge, we agree with this finding. The Respondent's statements effectively threatened employees with the loss of their promised wage increases and existing benefits and left them "with the impression that what they ultimately receive depends in large measure on what the Union can induce the employer to restore." *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). Moreover, the Respondent did not dispel the effect of its threat through additional communications, such as an explanation that "any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining." *Id.*; *see also Mercy General Hospital*, 334 NLRB 100, 104 (2001) (statement that bargaining would start at "ground zero" and employees "wouldn't have anything" found objectionable).

Accordingly, we agree with the judge that the first election was properly set aside and that the Respondent was properly ordered to bargain with the Charging Party Union based

on the results of the second election and the Union's certification.[6]

ORDER

The National Labor Relations Board reaffirms its original Order reported at 327 NLRB No. 17 (1998), and orders that the Respondent, Pearson Education, Inc., Lebanon, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

Joanne C. Mages, Esq., for the General Counsel.

Gregory J. Utken and *Todd M Nierman, Esqs.* (*Baker & Daniels*), of Indianapolis, Indiana, for the Respondent. *Barry A. Macey, Esq.* (*Macey, Macey & Swanson*), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. The Union of Needletrades, Industrial and Textile Employees, Midwest Region, AFL-CIO-CLC (the Union or UNITE) sought in 1997 to organize certain warehouse and distribution center employees of Macmillan Publishing, Inc.

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[6] The Respondent contends the voting unit is no longer appropriate due to "changed circumstances," including (1) a change in its owner-ship; (2) the relocation and consolidation of its two facilities into a single facility; (3) the installation of new equipment; and (4) substantial employee, supervisory, and managerial turnover. We reject this contention. Many of these changes occurred prior to the June 11, 1998 rerun election, upon which the Charging Party's certification is based, and were previously rejected by the court as a basis for upsetting that election. *See Macmillan Publishing*, supra at 167. In any event, whether these changes occurred before or after the rerun election, they do not warrant reexamination of the certified unit. *See R & S Truck Body Co.*, 334 NLRB No. 58 fn. 2 (2001) (not reported in Board volumes), and cases cited there.

An election petition was filed by the Union on June 10, 1997, and an election was held on August 13, 1997. The Union lost the election by the vote of 78 to 75.

Thereafter, the Union filed eight objections to the election. The Regional Director for Region 25 relying on only one of the eight objections and making no findings regarding the other seven objections set aside the election results and ordered a new election. The Board affirmed the Regional Director.

A second election was held on June 11, 1998, which the Union won by a vote 58 to 52 and the Union was duly certified as the exclusive collective-bargaining representative of the employees in the unit.

Thereafter Macmillan Publishing, Inc. refused to recognize and bargain with the Union and failed and refused to turn over certain information to the Union, which the Union had requested. Macmillan did so in order to test the certification.

Unfair labor practice charges were filed by the Union and a complaint issued. On October 30, 1998, the Board granted the General Counsel's Motion for Summary Judgment finding that Macmillan violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it refused to recognize and bargain with the Union and when it failed and refused to turn over certain information to the Union. The Board ordered Macmillan to recognize and bargain with the Union and turn over requested information to the Union. 327 NLRB No. 17 (1998) (not reported in Board volumes).

Macmillan appealed the Board's decision to the U.S. Court of Appeals for the District of Columbia Circuit. The issue before the court was whether the Regional Director was correct in setting aside the results of the August 13, 1997 election, which the Union lost. If he was correct then Macmillan violated the Act as the Board found but if he was wrong in setting aside the results of that election then Macmillan did

not violate the Act and had no duty to recognize and bargain with the Union.

The court on November 12, 1999, remanded the case to the Board for further proceedings. 194 F.3d 165 (D.C. Cir. 1999).

On April 24, 2000, the Board ordered "that a hearing be held before an Administrative Law Judge on all of the Union's objections" to the August 13, 1997 election. The Regional Director for Region 25 was ordered to arrange such a hearing and authorized to issue notice of such a hearing.

The hearing on remand was held before me on June 19–21, 2000, in Indianapolis, Indiana.

Briefs were submitted on August 16, 2000, on behalf of counsel for the General Counsel, Respondent, and the Charging Party Union.

At the outset of the hearing the name of the Respondent was changed from Macmillan Publishing, Inc. to Pearson Education, Inc. because in November 1998 Viacom sold Macmillan, Inc., d/b/a Macmillan Publishing, USA and Macmillan Publishing, Inc., became Pearson Education, Inc.

Union Objections to the August 13, 1997 Election

The Union filed eight objections to the election. At the hearing before me on June 19, 2000, the Union said that because of the passage of time they were prepared to go forward on only four of these objections, namely Objections 1, 2, 7, and 8.

I have renumbered the four objections we went to hearing on as Objections 1, 2, 3, and 4.

They are as follows:

> Objection 1: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by promising employees a wage increase to in-duce them to vote against the Union.

Objection 2: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by threatening employees with the loss of the promised wage increase as well as the loss of other benefits if they selected the Union as their bargaining representative.

Objection 3: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by engaging in campaign activity within close proximity of the polls on the day of the election.

Objection 4: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by making oral statements and distributing literature that misrepresented the law regarding the rights, duties and obligations of the parties in the collective bar-gaining process.

The Regional Director had set aside the August 13, 1997 election and ordered a new election based solely on Objection 2 and did not address any of the other objections.

Objection 1

Objection 1 alleges that "the employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by promising a wage increase to induce them to vote against the Union."

The bargaining unit is as follows:

All full-time and all regular part-time warehouse and distribution center employees employed by the Respondent at its Northwest Boulevard and Rockville Road, Indianapolis, Indiana facilities, including employees occupying the job classifications of Picker/Packer, Stocker/Trucks and Supervisor, BUT EXCLUDING all Order Management employees (including employees who occupy the classifications of New Title Coordinator, New Title Assistant, Proof of Delivery Clerk, Sales Support Coordinator and Sales Support Represen-

tative), all Customer Operations employees (including employees who occupy the classifications of 800 Line Representative and Customer Service Representative), all clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act."

The Union sought to represent the above-described unit of employees. These employees worked at one of two different facilities.

The two facilities, Northwest Boulevard and Rockville Road, were located in Indianapolis and Respondent was relocating to a new single facility in Lebanon, Indiana, more than 20 miles north of Indianapolis.

Three categories of employees were going to be relocated. They were category I, category II, and category III employees. Category I employees were employees who would be in the bargaining unit, category II employees were office workers, and category III employees were sales personnel.

In 1996 none of the employees received a pay raise. The move to Lebanon was scheduled for the beginning of 1998. During the critical period between the filing of the union election petition on June 10 and the election on August 13, 1997, Respondent announced that there would be raises implemented after the move to Lebanon. Employees in category II and category III, none of whom were included in the bargaining unit, would be getting small adjustments to their pay to offset the extra commuting costs to Lebanon but the employees in category I, i.e., those designated by the Board after hearing to be in the bargaining unit, would be getting significantly higher raises after the move to Lebanon compared to the category II and III employees.

President Scott Flanders announced the raise at a group meeting in late July 1997 and when asked by an employee if what he orally announced could be put in writing answered in the affirmative.

The written announcement of the raise for employees included in the bargaining unit was published on August 1, 1997, just 12 days before the August 13, 1997 scheduled union election.

The announcement of the raise was as follows:

> I am giving you this memo to put forth the wage plan we announced for Lebanon. Employees in the positions of Picker/Packer, Stocker/Trucks, Janitors, Distribution Co-ordinators and Supervisors will receive a $1.10 per hour increase effective with the opening of the Lebanon facility. We are planning to open the facility on January 1, 1998. Subsequent pay increases will be delivered through the merit increase program that all Simon & Schuster employees enjoy and it is planned you will receive an increase of at least $.15 on April 1, 1998 for a total minimum increase of $1.25 your first year in Lebanon. Shift bonuses of $.30 and $.50 are planned to remain at the current amounts.
>
> The Macmillan bonus plan which pays up to $500.00 when Macmillan meets its stated objectives will remain unchanged for 1997 and includes employees as of September 30th of the `bonus' year.
>
> This is in addition to the benefits of our new Lebanon facility: the increased job security that this investment in the Indianapolis area represents, the significantly improved work environment, and a state of the art operation.
>
> This wage plan represents the fulfillment of our earlier commitment to you and our desire for you to be as excited about the move to Lebanon as we are. Please don't hesitate to ask us any questions you have. We will do our best to get you prompt answers."

The Union argues that the promise of a wage increase was designed to undercut the Union and destroy the laboratory conditions for an election.

Relying on the Supreme Court's decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the Board has described its rule governing preelection grants of wage or benefit increases as follows:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has held that the rationale of Exchange Parts is applicable to objection cases. [Citation omitted.]
>
> Our standard in pre-election benefit cases is an objective one. *See, Gulf States Canners*, 242 NLRB 1326 (1979). To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it, (2) the number of employees receiving it: (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits." *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

Respondent claims that a raise was necessary in order to convince the employees designated by the Board to be in the bargaining unit, many of whom lived in the inner city of Indianapolis, to relocate to Lebanon. Respondent claims it did a wage survey and concluded that a larger raise was needed for category I employees to entice them to stay with Respondent and make the move to Lebanon because the wages for

category II and category III employees were already comparable to the pay received by employees doing similar work in the Lebanon area.

Respondent claims that the timing of the announcement of the raise was basically unavoidable. Again, the raise for bargaining unit employees, was announced just 12 days before the election.

According to the testimony of Orson Mason, Shellye Kaplin, and Robert Thompson, all supervisors and agents of Respondent at the times material to this case, the employees who were to be in the bargaining unit were always going to get a raise in order to induce them to transfer to Lebanon whether the Union was in the picture or not.

In April 1997 prior to the filing of the election petition Robert Thompson tasked Chloe Hartman to do a wage survey and report back to him. The results of the wage survey would help management decide how big a raise the employees should receive upon the move to Lebanon. Thompson had a target late of July when the Respondent would know what raise to give employees upon the move. Chloe Hartman was slow in getting the job done and indeed left Respondent's employ in June 1997. Shellye Kaplin took over for her. According to Thompson Hartman's delay pushed the process back approximately 1 month. In other words Hartman was slow in getting the data together that was needed to decide what raise was necessary. Hartman did not testify.

Suffice it to say Respondent decided to give very high raises to the employees who were in the designated bargaining unit in late July and announced the raise in writing on August 1, 1997. According to Thompson there was no reason to delay making the announcement and as soon as Respondent was able to do so it did make the announcement.

The raise was not to be effective until after the move to Lebanon, which was scheduled for January 1998, a full 5 months in the future.

Even assuming that the promise of a wage increase did not destroy the laboratory conditions for the election what happened just days before the election certainly did destroy those laboratory conditions as the Regional Director correctly concluded.

Objection 2

Objection 2 alleges that "the employer interfered with the employees free choice and destroyed the requisite laboratory conditions by threatening employees with the loss of the promised wage increase as well as the loss of other benefits if they selected the Union as their bargaining representative."

As noted above Respondent announced on August 1, 1997, just 12 days before the election, that after the move to Lebanon in January 1998, the category I employees, i.e., those employees who would be in the bargaining unit would be getting significant wage raises of more than 10 percent. And this, the promised raise, would be significantly higher than the raises to be given other employees who would also be transferring to Lebanon.

Respondent, also as noted above, promised this significant wage increase to the category I employees because, according to the testimony of Orson Mason, it wanted to incentivize the employees to make the move to Lebanon.

Within a few days, at the most, before the election on August 13, 1997, Respondent distributed to all employees the following leaflet:

"WHAT DO YOU HAVE TO LOSE?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week

x 13 weeks =	x 39 weeks =
$572.00 in Jan - Mar	$1,950.00 Apr - Dec

For a total of $2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

With a union, since all wages and benefits would be subject to negotiation no one can predict what the final wage package would be.

WHY TAKE THE RISK?

VOTE NO!

The Regional Director had relied on this distribution as being sufficient, in and of itself, to warrant setting aside the results of the August 13, 1997 election and ordering a rerun election. I believe he was correct. The Union won the second election, which was held on June 11, 1998, by a vote of 58–52. The second election took place after the move to Lebanon had occurred and after the employees had received the promised wage increases.

The juxtaposition of a significant wage increase being promised on August 1, 1997 just 12 days before the election—followed 2 or so days before the election with the leaflet that suggests to employees who had not had a raise since 1995 that if they voted for the union they risked losing $2522 just the next year alone and cautions them with the words "Why take the Risk? Vote No!" clearly interfered with the exercise of free choice.

The issue of whether the election should be set aside turns on whether the employer's conduct had a reasonable tendency to interfere with employee free choice. *See, e.g., NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988); Diner's Drive-In, 280 NLRB 971, 972 (1986). The Board

reasonably finds that employee free choice has been compromised when the election is tainted by conduct or statements that tend to induce employees to vote not based "upon conviction, but upon fear or upon any other improperly induced consideration." *Zieglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1005 (3d Cir. 1981); General Dynamics Corp., 250 NLRB 719, 722–723 (1980).

In evaluating the Employer's statements, the Board must take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Board applies an objective test to determine whether alleged misconduct has a reasonable tendency to coerce employees. Under that test, the issue is not whether an employer's statement or conduct in fact coerced the employees but whether it had a reasonable tendency to do so. *See Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

Here, there can be no doubt that the Employer's leaflet would reasonably be expected to cause the employees to fear the consequences of voting for union representation because the leaflet explicitly told employees that in doing so they were risking $2522. The leaflet created the situation whereby employees, when marking their ballots, would necessarily have to confront the fear they felt concerning the potential loss of the promised wage. Issuance of the leaflet, then, guaranteed that some degree of fear of economic loss would accompany employees into the polling booth. Inducing employees to vote based upon fear rather than conviction is objectionable conduct requiring that the election be set aside.

The leaflet is coercive in that it explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union. *See Pepsi-Cola Bottling Co.*, 315

NLRB 882, 892–893 (1994). The threat was reinforced by the small print of the leaflet which stated that, "*without* a union, [the Company] will be free to proceed ahead with the announced increases for the move [to Lebanon]" but "[w]ith a union, since all wage and benefits would be subject to negotiation, no one can predict what the final wage package will be. WHY TAKE THE RISK?" This language leaves the clear impression that if the employees select the Union, "what they may ultimately receive depends upon what the union can induce the employer to restore." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), accord: *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981). Conveying this message is coercive conduct because it sends the clear message that, in the absence of the Union, the Company is willing to grant the raise, but if the Union wins the election, the Company will pay only what the Union can force it to pay.

The conduct at issue must be evaluated in the context of "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relation-ship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, supra at 617. Here, the leaflet advised employees that they were risking a wage increase that had just been promised them. The promise of the wage increase heightened the employees' awareness of the source of their benefits. *NLRB v. Exchange Parts Co.*, supra at 409. When, within a matter of days after the promise was made, the employer advised employees that the raise might "dry up" if they selected the Union, the employees could reasonably interpret the message as a naked display of the fist that had been previously covered by the velvet glove of the wage increase promise.

The Employer contends that the leaflet was not a threat but was instead an accurate statement of what happens in bar-

gaining. Given the context just described and given the format of the leaflet itself, which emphasizes the risk of loss through the size of the type and the placement of the words on the page, it is more reasonable to conclude that employees interpreted the leaflet as a threat of wage loss rather than an exposition on the bargaining process. As such, the leaflet is clearly grounds for overturning the election because the Board has held that where an employer threatens to withdraw a wage increase that it has promised during the same election campaign, the employer's conduct "is a heavy suppression of employees' rights to engage in protected activities." *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), enfd. in relevant part 148 F.3d 1166, 1175 (D.C. Cir. 1998).

Moreover, contrary to the Employer's argument, the small print of the leaflet does not contain an accurate explanation of the bargaining process or the impact of the process on the previously promised wage increase. The leaflet carried the clear message that if the employees selected the Union, the Company would not "be free" to implement the raise because "all wages and benefits would be subject to negotiation." This is not true, however, because as the raise was promised before the election and before the employer had any duty to bargain, it would have the right and the duty to implement the raise at the scheduled time if the Union won the election.

This point is explicitly made in *Advo System Inc.*, 297 NLRB 926 (1990). There, in response to an employee's question whether he would receive his scheduled pay raise, the employer responded that if the union won the election, "everything would be negotiable." The administrative law judge concluded that this response constituted a violation of Section 8(a)(1), and the Board affirmed. The judge reasoned as follows:

> The Board rule is that if a wage increase is scheduled to take effect at a particular time (in this case, Rose's raise was due at the end of May 1998 presumably following

the election) and if, at that time, a question concerning representation is pending, the employer, in the face of the actually scheduled wage increase, would be obligated to grant the increase. This result is in accordance with the familiar principle that . . . "an employer, in deciding whether to grant benefits while the representation election is pending should decide that question as it would if a union were not in the picture." Thus, by operation of law, [the employer], in such a case, would have been obligated to grant the in-crease at that time." *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), enfd. 573 F.2d 702 (1st Cir. 1978) . . . . [A]ccepting Boatman's testimony that he answered the unnamed employee's question at the shift meeting in May, 1998 (whether he would get a pay increase if the Union got in) that . . . "under those circumstances, everything would be negotiable," such an answer is inconsistent with the above rule. Everything is not negotiable . . . As noted in *Arrow Elastic Corp.*, supra, everything is not negotiable. The question should have been decided as if the Union were not in the picture. A legally correct answer by Boatman would have been that if the pay increase that the employee was talking about were actually scheduled, the employee would receive the pay increase. Absent such a precise answer, Boatman should have answered that Respondent would be guided by the principle that the granting of benefits would be decided as if the Union were not in the picture with the pending election. Even this more general answer would have been satisfactory. To answer the question, however, that "everything is negotiable," reasonably leaves in the minds of the employees (who are not law professors or grammarians) that even scheduled pay increases would be "negotiable." . . . Boatman's statement, whether a threat or merely a coercive statement tending to tending to interfere with Section 7 rights of the shift employees, under *Arrow Elastic Corp.*, violated Section 8(a)(1) of the Act. 297 NLRB at 940.

If a raise is scheduled before a union wins a representation election, the union, after the election, does not have to bargain to have the employer implement the raise. The raise should go into effect as if the union were not in the picture. If theory, the union, could bargain away the raise. As the raise exceeded 10 percent and healthy negotiated raises in the time period were in the vicinity of 3 percent, the Union would have had no incentive to do so. Moreover, although the Union could legally bargain away the increase that is not what the leaflet says. The message of the leaflet is that the Union would have to bargain to get the employees the raise, and this is simply not true.

In the instant case, as in *Advo System, Inc.*, the Employer, in the leaflet, mischaracterized the law and advised employees that they would get the raise if the union lost the election but risked losing the raise if the Union won because everything would be negotiable. For the reasons stated in *Advo System*, this statement interfered with the employees' exercise of their Section 7 rights. Accordingly, the Regional Director was correct in concluding that the election should be set aside.

Objection 3

Objection 3 alleges that "the employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by engaging in campaign activity within close proximity of the polls of the day of the election."

On August 13, 1997, the day of the election, Union Representative Pat Cronin observed a poster, which was in plain view of all persons who were going to vote. In order to get to the polling place the employees who would be voting had to pass by this poster which was 2 by 3 feet and contained on it a list of strikes over the last several years before the election in which the striking employees were members of the very same union seeking to represent Respondent's employees.

The Board prohibits electioneering at the polls as it prohibits captive audience meetings within 24 hours of the election. *Peerless Plywood Co.*, 107 NLRB 427 (1953).

Prior to anyone voting Union Representative Cronin told Respondent's attorney that he found the poster objectionable. Respondent's attorney, who is not either of Respondent's attorneys in the instant case, refused to honor Cronin's request to remove the poster. He told Cronin to file an objection, which Cronin did.

At the hearing before me management official Orson Mason testified that the poster was hung high on the wall and had been there throughout the period of time between the election petition being filed in early June and the election and he was sure everyone had seen it so often it was something you wouldn't even notice. On the other hand during the campaign the Employer warned employees about strikes, which it claimed occurred only when unions were on the scene and if there was a strike employees don't get paid, lose health insurance, don't get unemployment, can be permanently replaced and if an employee doesn't strike may see his or her car vandalized and be subject to harassment. See Respondent's Exhibits 8, 9, and 10.

The poster, I find, and the circumstances under which it was displayed, coupled with the threat of loss of wage increases if the Union gets in warrant setting aside the results of the August 13, 1997 election.

Objection 4

Objection 4 alleges that "the employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by making oral statements and distributing literature that misrepresented the law regarding the rights, duties and obligations of the parties in the collective bargaining process."

Three of the witnesses for the Charging Party were Tami Jo Benton, Richard Williams, and Jacqueline Brauss.

Benton was fired in November 1998 and may be perceived to have a motive to fabricate but I found her credible when she testified that at a group meeting of employees presided over by supervisors John Lytle and Richard Krivacic that Lytle when asked if the employees would still get the raises if the Union was voted in answered in the negative. Another employee at the meeting said that Scott Flanders, the president, had said the employees would still get the raise even if the Union was voted in. Respondent's supervisor, Orson Mason, was called into the meeting and when asked if Flanders said the employees would get the raise whether the union was voted in or not replied, "I don't remember, but I don't believe you will, because when we go to negotiate, if the union gets in, we start at zero." This statement corroborates the threat that later appears in the leaflet that is distributed to all employees and is the subject of Objection 2.

Lytle, Krivacic, and Mason all deny that "negotiations start at zero" or words to the effect were ever said by them or any member of management during the campaign. Mason claims he said if the Employer is committed to a wage increase it would be part of the baseline, which is the point at which negotiations begin. He did not say, however, whether or not the employer was committed to the wage increases. Hence a reasonable person would assume he or she could lose the raise if the Union wins the election.

Dick Williams, who worked for Macmillan and is now with Pearson Education, Inc., credibly testified that he heard Orson Mason say that if the Union got in that employees lose benefits and everything goes to zero. Mason denied he said this or heard other management official ever say it.

Williams also credibly testified that after the written announcement about the raise to be given after the move to

Lebanon Corey Baudy, a floor manager and statutory supervisor, said that if the union got in the employees would not get the promised wage increases upon the move to Lebanon. Baudy said this in Williams' presence and in the presence of other employees. Corey Baudy did not testify.

Williams also credibly testified that Manager and Statutory Supervisor David Kern told him in the presence of another employee that if the Union was voted in the employees would not get the promised wage increases when they moved to Lebanon. David Kern did not testify.

Williams contacted the Union and asked the Union to clarify the Employer's obligations with regard to the promised wage increases. The Union position statement is in the record as Respondent's Exhibit 4. Several copies of Respondent's Exhibit 4 were given by the Union to the 10 employees who were members of the organizing committee but Respondent's Exhibit 4 was not distributed to all the employees.

Just a day or so before the election Williams received Charging Party's Exhibit 2—the "What do you have to lose" leaflet—and credibility testified that he observed female employees in the shop crying over the possible loss of their wage increases if the union got selected.

Jacqueline Brauss worked for Macmillan and currently works for Pearson Education, Inc. Like the other employees she attended three small group meetings and two larger meetings where management talked to the employees about the up-coming election. Brauss was unclear on some of her testimony and even testified at one point on direct examination as follows: "I'm so bad on remembering things. I really apologize for it." She also testified that at some meetings she didn't pay attention and once even wrote a letter to her sister during the meeting. Accordingly, while I'm sure Brauss tried to tell the truth, I give no weight to her testimony.

The credited testimony of Benton about Supervisor Mason's statements and Williams' credited testimony about Supervisors Mason, Baudy, and Kern coupled with the threat of loss of wage increases in the leaflet distributed just a couple of days before the election and electioneering by the employer on the very day of the election again warning of strikes conclusively manifest that the results of the first election were correctly set aside.

Conclusion

The results of the first election were properly set aside and a new election properly ordered by the Regional Director. The results of the second election were 58 to 52 in favor of the Union. There are no outstanding objections to the second election.

The Union was certified as the exclusive collective-bargaining representative of a unit of employees. Again Respondent, in order to test that certification, refused to recognize and bargain with the Union and failed and refused to turn over certain information to the Union, which all parties agree was relevant to and necessary for the Union to carry out its collective-bargaining responsibilities.

The Decision and Order of the Board in Macmillan Publishing, Inc., 327 NLRB No. 17 (1998) (not reported in Board volumes), accordingly, is reinstated. The name of the Respondent should be corrected to read Pearson Education, Inc.

Respondent's Motion to Dismiss Complaint

Respondent made a motion to dismiss complaint when the hearing before me opened on June 19, 2000. I denied the motion.

Respondent's motion to dismiss complaint and the affidavit of Brett McCollum in support of the motion are in evidence as Respondent's Exhibits 1 and 2.

Respondent moved to dismiss the complaint because of substantial changes in operations and significant turnover in employees since the first election on August 13, 1997.

However, all the assertions made in its motion to dismiss were brought to the attention of the Board in a pleading prior to the Board's April 24, 2000 remand to the Regional Director.

The Board limited the remand to the administrative law judge as follows "It is ordered that a hearing be held before an Administrative Law Judge on all of the Union's objections."

As a result I denied Respondent's motion to dismiss.

ORDER

Absent further proceedings before the Board or courts, Respondent should comply with the Board's Decision and Order of October 30, 1998. See 327 NLRB No. 17 (1998) (not reported in Board volumes).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1554

MACMILLAN PUBLISHING CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNION OF NEEDLETRADES, INDUSTRIAL AND
TEXTILE EMPLOYEES, AFL-CIO,

Intervenor.

On Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

Gregory J. Utken argued the cause for petitioner. With him on the briefs was Frank Swain.

Robert J. Englehart, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Linda Sher, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Frederick C. Havard, Supervisory Attorney. John D. Burgoyne, Deputy Associate General Counsel, entered an appearance.

Barry A. Macey was on the brief for intervenor.

Before: SILBERMAN, RANDOLPH, and TATEL, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge Randolph.

Randolph, *Circuit Judge*: Macmillan Publishing, Inc. refused to bargain with, or furnish information to, a union that won the second of two representation elections. The company defended against the resulting unfair labor practice charges on the ground that the National Labor Relations Board had improperly certified the union as the employees' bargaining representative. The Board ruled against the company and ordered, among other things, that the company bargain with the union. The company's petition for judicial review followed. The Board then cross-petitioned for enforcement and the union—the Union of Needletrades, Industrial and Textile Employees—intervened.

The company is engaged in the wholesale distribution and sale of books and reference materials. It operated two warehouses in Indianapolis, Indiana. The union filed a petition with the Board seeking to represent "all full and regular part-time warehouse and distribution center employees" at the two facilities. The company objected to an election as premature: in six months, it would be transferring its Indianapolis operations to a new "Customer Center" some 17 miles away; no formal offers of employment had yet been made to the current unit employees; additional employees would be hired to work at the new operation. The Regional Director overruled the objection and ordered an election, which the union lost by a vote of 78 to 75. The union filed eight objections. The Regional Director sustained the union's Objection 2 and ordered a new election, without passing on the union's other complaints. The union won the second election by a vote of 58 to 52.

The union's Objection 2 centered on a campaign leaflet the company handed to its employees. The leaflet read:

WHAT DO YOU HAVE TO LOSE?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week
x 13 weeks =	x 39 weeks =
$572.00 in Jan - Mar	$1,950.00 Apr - Dec

For a total of $2,522.00 next year Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package would be.

WHY TAKE THE RISK?

VOTE NO!

The "$2,522.00" referred to an across-the-board wage increase the company had announced two days earlier. (One of the union's objections dealt with the timing of the wage increase.)

We may quickly dispatch the company's argument that the first election was premature because of the impending transfer to the Customer Center. As the union rightly points out, the second election (which the union won), not the first (which the union lost) led to the Board's bargaining order. By the time of the second election, the company's move to the new facility had already taken place. Of the employees eligible to vote in the second election, 86% had previously worked in the company's two Indianapolis facilities. The Regional Director's predictive judgment before the first

election—that the work force at the old locations would be a substantial and representative complement of the work force at the new location—thus turned out to be accurate. Nothing more is needed to sustain the Board's order insofar as it rested on the results of the second election. *See NLRB v. AAA Alternator Rebuilders, Inc.*, 980 F.2d 1395, 1397-98 (11th Cir. 1993).

The remaining question is whether the Board, through its Regional Director, properly overturned the first election because of the company's leaflet. For its part the company relies on its free speech right as recognized in s 8(c) of the National Labor Relations Act, 29 U.S.C. s 158(c): "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." Section 8(c) does not exactly fit this case. The issue here arose in the context of a representation election and the consequence of the leaflet was not an unfair labor practice charge, but a new election. Nonetheless, the Board admitted at oral argument that its treatment of employer communications at the election stage is indistinguishable from how it decides if an employer's "expression" is outside s 8(c)'s protection because it "contains [a] threat of reprisal or force or promise of benefit."

As to the leaflet, the company insists that it was literally true, and as such did not constitute a threat to employees. We are not sure the last proposition follows from the first. The statement "If you vote for the union, the company will do everything it can to reduce your wages," may be truthful, depending on the company's intentions, but it is certainly a threat. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969). The leaflet was, so the company tells us, not only truthful but also non-threatening because it did not say the employees would lose their recently-announced pay raise. It

said instead that with a union, the employees would risk losing the raise because "all wages and benefits would be subject to negotiation," which is true, whereas without a union the company "will be free to proceed ahead" with the raise, which is also true. Compare *General Elec. Co. v. NLRB*, 117 F.3d 627, 635-36 (D.C. Cir. 1997). The Board counters with this argument: the "test" is whether the employer's communication had a "reasonable tendency" to coerce employees; this depends on the particular labor relations setting; here the wage increase announced on the eve of the election heightened employee awareness of their economic dependence on the employer; the Board is expert in assessing the impact; and courts should recognize the Board's wide discretion in such matters. In support, the Board cites many of its decisions and the decisions of federal courts.

The trouble is that the Regional Director, whose decision the Board refused to review, cited none of the authorities the Board relies upon in its brief. Here is the sum and substance of his reasoning:

> It is well settled that, during a union organizing campaign, an employer should decide the question of granting or withholding benefits as it would if a union were not in the picture. Stumpf Motor Company, 208 NLRB 431 (1974); The Gates Rubber Company, 182 NLRB 95 (1970); The May Department Stores Company d/b/a Famous-Barr Company, 174 NLRB 770 (1969). Exhibit 1 herein violates this principle by leaving it in the minds of the employees that they will lose the previously announced raise, amounting to $2,522.00 projected over the next year, if the union is voted in. The Employer's mention, later in the document, (in much smaller print) that all wages and benefits are subject to negotiation does not cure the clear implication that the employees will not get their promised raise if the union is voted in. Accordingly, I find that the issuance and distribution of

> Exhibit 1 by the Employer constitutes objectionable conduct and Petitioner's Objection 2 is sustained.

The Regional Director's first sentence is inscrutable. It deals with the timing of the wage increase. Each of the Board cases cited in support of that sentence dealt with the same subject. *See Stumpf Motor Co.*, 208 N.L.R.B. at 433 (regarding raise announcements, "an employer's legal duty during the pendency of a representation petition 'is to proceed as he would have done had the union not been on the scene'") (quoting Gates Rubber Co., 182 N.L.R.B. at 95); May Dep't Stores, 174 N.L.R.B. at 770 (during election campaign, employer "should decide the question of granting or withholding benefits as he would if a union were not in the picture"). But the often perplexing issues regarding the timing of a raise were not what the Regional Director was addressing. *See Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 836-37 (D.C. Cir. 1998); *id.* at 839-40 (Randolph, J., dissenting). Although the union had interposed an objection on this ground, the Regional Director adjudicated only the union's second objection, which dealt with the alleged threat in Exhibit 1—the leaflet. The Regional Director's second sentence therefore makes no sense. Exhibit 1 could not have violated the "principle" that an employer should act as "if a union were not in the picture." There is no such principle governing employer communications during election campaigns, and we doubt that there could be in light of the First Amendment. *See US Airways, Inc. v. National Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999). In any event, the Board does not defend the ordering of anew election on such a ground.

Despite the Board's discretion in regulating representation elections, *see Timsco Inc. v. NLRB*, 819 F.2d 1173, 1175-76 (D.C. Cir. 1987), we must set aside its order in this case. To borrow from Chief Justice Marshall, an agency's discretionary choices are not left to its "inclination, but to its judgment; and its judgment is to be guided by sound legal

principles." *United States v. Burr*, 25 F.Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d). The Regional Director's judgment rested on no sound principle. His rationale was the antithesis of reasoned decisionmaking, and as such was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Counsel for the Board has offered different reasons to support the ordering of a second election. We express no view on their validity. We cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

The petition for judicial review is granted. The cross-petition for enforcement is denied. The case is remanded to the Board for further proceedings.

So ordered.

APPENDIX E

Macmillan Publishing, Inc. and Union of Needletrades, Industrial & Textile Employees, Midwest Region, AFL-CIO-CLC

Case 25-CA-26182

October 30, 1998

DECISION AND ORDER

BY *Members* FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge and amended charge filed on August 18 and September 3, 1998, respectively, the Acting General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 4, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish necessary and relevant information following the Union's certification in Case 25—RC—9681. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer with defenses admitting in part and denying in part the allegations in the complaint.

On October 2, 1998, the Acting General Counsel filed a Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment. On October 6, 1998, the Board issued an order transferring the proceeding to the

Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bar-gain and to furnish information that is relevant and necessary to the Union's role as bargaining representative but attacks the validity of the certification of the Union based on the Board's action in conducting the second election on which this certification is based and on the Board's unit determination in the underlying representation proceeding. The Respondent admits it has failed to bargain in good faith with the Union in order to test the Union's certification.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no issues warranting a hearing with respect to the Union's request for information. As set forth in the Acting General Counsel's Motion, in its letter dated July 10, 1998, the Union requested the Respondent to provide the following information:

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[1] Member Hurtgen did not participate in the underlying representation case. He agrees for institutional reasons with this decision because the Respondent has not raised any new matters in this proceeding.

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and Social Security number;
2. A copy of all current company personnel policies, practices or procedures;
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above;
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees;
5. Copies of all current job descriptions;
6. Copies of any company wage or salary plans;
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.

The complaint alleges, and the Respondent's answer admits that the Union requested information that would be relevant for bargaining and that it has refused to furnish the information.

Accordingly, we grant the Motion for Summary Judgment[2] and will order the Respondent to bargain and to furnish the requested information.

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[2] Inasmuch as we have granted the General Counsel's Motion for Summary Judgment, it is unnecessary to rule on the Motion to Strike Portions of the Respondent's Answer.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Indianapolis, Indiana, has been engaged in the business of the wholesale distribution and sale of books and reference materials.

During the 12-month period ending July 31, 1998, the Respondent, in conducting its business operations described above, purchased and received at its Indianapolis, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the second election held June 11, 1998, the Union was certified on June 30, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and all regular part-time warehouse and distribution center employees employed by the Respondent at its Northwest Boulevard and Rockville Road, Indianapolis, Indiana facilities, including employees occupying the job classifications of Picker/Packer, Stocker/Trucks and Supervisor, BUT EXCLUDING all Order Management employees (including employees who occupy the classifications of New Title Coordinator, New Title Assistant, Proof of Delivery Clerk, Sales Support Coordinator and Sales Support Represen-

tative), all Customer Operations employees (including employees who occupy the classifications of 800 Line Representative and Customer Service Representative), all clerical employees, sales-persons, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About July 10, 1998,[3] the Union, by letter, has requested the Respondent to recognize and bargain and to furnish information, and, since about July 10, 1998, and more particularly by letter dated August 14, 1998, the Respondent has failed and refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

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[3] The Respondent admits that by letter dated July 10, 1998, the Union requested bargaining and that by letter dated August 14, 1998, it has declined to bargain and to furnish information. Although the Respondent claims that prior to August 14, 1998 "it had taken no position in response to the Union's request," by virtue of the Union's certification the Respondent was obligated to bargain with the Union on request. We therefore find that the Respondent has failed and refused to bargain and to provide information since on or about July 10, 1998.

CONCLUSIONS OF LAW

By failing and refusing on and after July 10, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, MacMillan Publishing, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Union of Needletrades, Industrial & Textile Employees, Midwest Region, AFL–CIO–CLC, as the exclusive bar-

gaining representative of the employees in the bargaining unit, and failing and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and all regular part-time warehouse and distribution center employees employed by the Respondent at its Northwest Boulevard and Rockville Road, Indianapolis, Indiana facilities, including employees occupying the job classifications of Picker/Packer, Stocker/Trucks and Supervisor, BUT EXCLUDING all Order Management employees (including employees who occupy the classifications of New Title Coordinator, New Title Assistant, Proof of Delivery Clerk, Sales Support Coordinator and Sales Support Representative), all Customer Operations employees (including employees who occupy the classifications of 800 Line Representative and Customer Service Representative), all clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act.

(b) Furnish the Union the information that it requested on July 10, 1998.

(c) Within 14 days after service by the Region, post at its facility in Indianapolis, Indiana, copies of the attached

notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 10, 1998.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 30, 1998

SARAH M. FOX, Member

WILMA B. LIEBMAN, Member

PETER J. HURTGEN, Member

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated The National Labor Relations Act and has ordered us to post and abide by this notice.

We will not refuse to bargain with Union of Needletrades, Industrial & Textile Employees, Midwest Region, AFL-CIO-CLC, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and all regular part-time warehouse and distribution center employees employed by us at its Northwest Boulevard and Rockville Road, Indianapolis, Indiana facilities, including employees occupying the job classifications of Picker/Packer, Stocker/Trucks and Supervisor, BUT EXCLUDING all Order Management employees (including employees who occupy the classifications of New Title Coordinator, New Title Assistant, Proof of Delivery Clerk, Sales Support Coordinator and Sales Support Representative), all Customer Operations employees(including employees who occupy the classifications of 800 Line

Representative and Customer Service Representative), all clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information it requested on July 10, 1998.

MACMILLAN PUBLISHING, INC.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION TWENTY-FIVE

Case 25-RC-9681

MACMILLAN PUBLISHING, INC.
Employer

and

UNION OF NEEDLETRADES, INDUSTRIAL & TEXITLE
EMPLOYEES, MIDWST REGION, AFL-CIO-CLC
Petitioner

THIRD SUPPLEMENTAL DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to a petition filed on June 10, 1997, and a Decision and Direction of Election issued July 14,1997, an election was conducted on August 13, 1997 among certain employees of the above-named Employer to determine whether or not they desired to be represented by the Petitioner for the purposes of collective bargaining.[1]

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[1] The appropriate unit as set forth in the Decision and Direction of Election is as follows:

> All full-time and all regular part-time warehouse and distribution center employees employed by the Employer at its Northwest Boulevard and Rockville Road, Indianapolis, Indiana facilities, including employees occupying the job classifications of Picker-packer, Stocker/Trucks and Supervisor; BUT EXCLUDING all Order Management employees (including employees who occupy the classifications of New Title Coordinator, New Title Assistant,

At the election, the challenged ballots were sufficient in number to affect the results of the election. On August 20, 1997, both the Petitioner and the Employer, timely 61ed objections to the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, an investigation of the issues raised by the challenged ballots and objections was conducted under the direction and supervision of the undersigned Regional Director. Who, after the consideration of the results thereof, issued his Supplemental Decision, Order Director Hearing and Notice of Hearing on September 16, 1997. In said Supplemental Decision and Order, the undersigned ordered that a hearing be conducted before a duly designated Hearing Officer solely to resolve the issues raised by the challenges to the ballots of 16 employees.

Pursuant to the Supplemental Decision and Order, a hearing was held on November 14, 1997, Hearing Officer Joanne Mages issued her Report on Challenges and Recommendations to the Regional Director. After reviewing the record evidence and the Exceptions to the Hearing Officer's Recommendations, which were filed by the Petitioner, the undersigned Regional Director issued his Second Supplemental Decision and Order. On March 13, 1998, the Board issued an Order denying the Petitioner's Request for Review of said Supplemental Decision and Order. Thereafter, on March 24, 1998, certain changed ballots were counted.

Proof of Delivery Clerk, Sales Support Coordinator and Sales Support Representative), all Customer Operations employees (including employees who occupy the classifications of 800 Line Representative and Customer Service Representative), all clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act.

The Revised Tally of Ballots made available to the parties at the count shows the following results:

Approximate number of eligible voters	159
Void Ballots	0
Votes cast for Petitioner	75
Votes cast against participating labor organizations	78
Valid votes counted	153
Undetermined Challenged ballots	0
Valid votes counted plus challenged ballots	153

On April 3, 1998, the Employer withdrew its objections to the election. Said withdrawal is hereby approved.

THE OBJECTIONS

The Petitioner's objections have yet to be ruled upon. At this time, I find it necessary to consider only Petitioner's Objection 2 which reads as follows:

> OBJECTION 2: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by threatening with the loss of promised wage increase as well as the lost of other benefits if they selected the Union as their bargaining representative.

In support of this objection, the Petitioner submitted a document, a copy of which is attached hereto as Exhibit 1. The Employer issued this document to employees about 10 days before the election. The Employer had previously announced to employees that it was planning to move the facility involved herein to Lebanon, Indiana in January of 1999. In fact, the move to Lebanon was an issue litigated in the preelection hearing in this case. The Employer had also previously announced that hourly wage increases of $1.10 would be given to employees in connection with the move. There is no dispute between the parties about the above facts, although the Employer does dispute that Exhibit 1 constitutes a threat of loss of a promised wage increase.

It is well settled that, during a union organizing campaign, an employer should decide the question of granting or withholding benefits as it would if a union was not in the picture. Stumpf Motor Company, 208 NLRB 431 (1974); The Gates Rubber Company, 182 NLRB 95 (1970); The May Department Stores Company d/b/a Famous-Company, 174NLRB 770 (1969). Exhibit 1 herein violates this principle by leaving it in the minds of the employees that they will lose the previously announced raise, amounting to $2,522.00 projected over the next year, if the union is voted in. The Employer's mention, later in the document,(in much smaller print) that all wages and benefits are subject to negotiation does not cure the clear implication that the employees will not get their promised raise if the union is voted in. Accordingly, I find that the issuance and distribution of Exhibit 1 by the employer constitutes objectionable conduct and Petitioner's Objection 2 is sustained.

In view of my finding on Objection 2, it is not necessary at this time to rule on the remaining objections.[2]

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[2] In the event that my decision is not upheld by the Board (pursuant to the filing of a proper request for review), subsequent action will be taken with regard to the remaining objections.

ORDER [3]

For the reasons hereinabove set forth, IT IS HEREBY ORDERED THAT: Petitioner's Objection 2 be sustained and the election conducted on August 13, 1977 be set aside.

DIRECTION OF SECOND ELECTION

A second election by secret ballot will be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the Notice of Second Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of this Third Supplemental Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period,

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[3] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. The request for review must be received by the Board in Washington by May 29,1998.

Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its position on this objection and which are not included in the Supplemental Decision and Order are not a part of the record before the Board unless appended to the request for review or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replace. Those eligible shall vote whether they desire to be represented by Union of Needletrades, Industrial & Textile Employees, Midwest Region, AFL-CIO-CLC.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that within 7 days of the date of this Third Supplemental Decision, two copies of an election eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the undersigned who shall make that list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Board Office, Region 25, Room 238, Minton-Capehart Federal Office Building, 575 N. Pennsylvania Street, Indianapolis, Indiana, 46204, on or before May 22, 1998. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

Dated at the Indianapolis, Indiana this 15th day of May, 1998.

/s/ Robert G. Chavarry
ROBERT G. CHAVARRY
Regional Director
National Labor Relations Board
Region Twenty-Five
Room 238
Minton-Capehart Federal Building
575 N. Pennsylvania Street
Indianapolis, IN 46204

EXHIBIT 1

WHAT DO YOU HAVE TO LOSE ?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week
x 13 weeks =	x 39 weeks =
$572.00 in Jan - Mar	$1,950.00 Apr - Dec

For a total of $2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

With a union, since all wage and benefits would be subject to negotiation, no one can predict what the final wage package would be.

WHY TAKE THE RISK

VOTE NO!

(3)

Supreme Court, U.S.
FILED
DEC 22 2004
OFFICE OF THE CLERK

No. 04-467

In the Supreme Court of the United States

PEARSON EDUCATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner's campaign leaflet threatened to withhold a promised wage increase if the Union won the election, and thus warranted setting aside the election result and directing a second election.

2. Whether the National Labor Relations Board properly determined that asserted changed circumstances did not render the certified bargaining unit inappropriate.

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In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after remand (Pet. App. 1a-11a) is reported at 373 F.3d 127. The decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 19a-23a), including the decision of the administrative law judge (Pet. App. 23a-42a), is reported at 336 N.L.R.B. 979. The Board's subsequent denial (Pet. App. 12a-18a) of petitioner's motion for reconsideration or for reopening of the record is unreported.

The earlier decision of the court of appeals remanding the case to the Board (Pet. App. 43a-49a) is reported at 194 F.3d 165. The initial decision and order of the Board (Pet. App. 50a-59a) is reported at 327 N.L.R.B. No. 17. The decision of the regional director (Pet. App. 60a-67a) in the representation proceeding is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2004. The petition for a writ of certiorari was filed on October 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner distributes and sells reference materials and educational materials. Pet. App. 2a, 44a. In 1997, petitioner—then Macmillan Publishing, Inc.— operated two distribution warehouses in Indianapolis. *Ibid.* In June 1997, the Union of Needletrades, Industrial and Textile Employees of the AFL-CIO (Union) petitioned the Board to represent "all full-time and all regular part-time warehouse and distribution center employees" at both facilities. *Id.* at 2a-3a, 44a. Petitioner argued that holding an election at that time would not effectuate the purposes of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, because in January 1998 petitioner was planning to consolidate and transfer its operations to a new facility 17 miles away. Pet. App. 3a, 44a. The Board's regional director found that the intended relocation did not render an immediate election inappropriate and directed an election. *Ibid.* The Board denied petitioner's request for review of that decision. *Ibid.*

The election was held on August 13, 1997. Pet. App. 3a. The initial results revealed a sufficient number of challenged ballots to affect the results of the election, and the regional director ordered a hearing to resolve the ballot challenges. *Ibid.* With the election outcome then unknown, petitioner and the Union both filed objections to the election. *Ibid.* After resolving the ballot challenges, the regional director issued a revised tally indicating that the Union lost the election, 78-75. *Id.* at

3a, 44a. Petitioner withdrew its objections to the election, leaving the Union's objections to be resolved by the regional director. *Id.* at 3a, 60a-66a.

One of the Union's objections alleged that a leaflet distributed by petitioner "threaten[ed] employees with the loss of the promised wage increase . . . if they selected the union as their bargaining representative." Pet. App. 3a, 62a. About a week prior to circulating the leaflet, petitioner announced that, after the move to the new facility, employees would be getting hourly increases of $1.10, and later of $1.25, a total wage increase of approximately 10%. *Id.* at 3a, 8a, 28a. Several days before the election, petitioner distributed a leaflet that stated:

WHAT DO YOU HAVE

TO LOSE?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week
x 13 weeks =	x 39 weeks =
$572.00 in Jan-Mar	$1,950.00 Apr-Dec

For a total of $2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

> With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package would be.
>
> **WHY TAKE THE RISK?**
>
> **VOTE NO!**

Id. at 3a, 31a-32a, 67a.

b. Without passing on the Union's other objections, the regional director sustained the Union's claim that the leaflet constituted objectionable conduct. Pet. App. 44a, 62a-63a. The regional director found that the leaflet violated the principle that "an employer should decide the question of granting or withholding benefits as it would if a union were not in the picture." *Id.* at 4a, 63a. The Board denied petitioner's request for Board review of the regional director's decision. *Id.* at 4a.

2. a. A second election was held in June 1998, after petitioner had completed its move to the new facility. The Union won 58-52. Pet. App. 4a, 32a. Petitioner filed objections to the election, which did not allege that any objectionable conduct had affected the second election, but alleged only that the first election should not have been held because of petitioner's impending move, or, alternatively, should not have been set aside. *Id.* at 4a. The regional director denied the objections and issued a certification of representative. *Ibid.* The Board denied petitioner's request for review. *Ibid.*

b. Petitioner refused to comply with the Union's bargaining demand and the Union's request for information. Pet. App. 4a, 51a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). Pet. App. 4a, 50a. In October 1998, the Board upheld

the allegations of the complaint and ordered petitioner to bargain on request with the Union. *Id.* at 4a, 50a-59a.

3. Petitioner filed a petition for review of the Board's order in the court of appeals. Pet. App. 4a, 43a-49a.

The court first "quickly dispatch[ed] the [petitioner's] argument that the first election was premature because of the impending transfer to" the new facility. Pet. App. 45a. The court noted that the union's certification was based on the second election, not the first one, and the second election took place *after* the move to the new facility. *Id.* at 45a-46a.

Turning to the Board's decision to set aside the first election, the court of appeals rejected the regional director's conclusion that the leaflet itself violated the principle that an employer during an election campaign "should act as if a union were not in the picture." Pet. App. 48a (internal quotation marks omitted). The court stated that "[t]here is no such principle governing employer communications during election campaigns." *Ibid.* The court noted that in court the Board had sought to defend its decision to order a second election on other grounds, including the fact that the leaflet made an impermissible threat, but the court concluded that it "cannot sustain agency action on grounds other than those adopted by the agency in the administrative proceedings." *Id.* at 49a. The court remanded the case to the Board for further proceedings. *Ibid.*

4. a. On remand, after a further hearing, an administrative law judge found that petitioner's leaflet was "coercive in that it explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." Pet. App. 33a. The judge found that the leaflet "sends the clear message" that, in the

absence of the Union, petitioner "is willing to grant the raise, but if the Union wins the election, [petitioner] will pay only what the Union can force it to pay." *Id.* at 34a. The judge observed that, because the raise was promised before the election, petitioner had a duty to implement it at the scheduled time if the Union won. The message of the leaflet, however, was not that the union could bargain away the increase, but that "the Union would have to bargain to get the employees the raise, and this is simply not true." *Id.* at 37a. Accordingly, the judge set aside the first election, reaffirmed the Union's certification based on its victory in the second election, and recommended that the Board reaffirm its order requiring petitioner to bargain with the Union. *Id.* at 5a, 23a-42a.[1]

Petitioner filed exceptions to the judge's decision with the Board. Pet. App. 5a, 19a. On October 31, 2001, the Board, accepting the judge's recommendation, issued a decision reaffirming its prior bargaining order. *Id.* at 5a, 19a-22a.

b. Petitioner filed a motion for reconsideration or for reopening of the record. The motion contended that, in the time since the regional director's designation of the bargaining unit and the two elections, numerous changes at its new facility rendered the bargaining unit inappropriate. Pet. App. 6a, 12a. The Board denied petitioner's motion. *Id.* at 6a, 12a-18a. The Board noted

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[1] At the hearing, the Union withdrew four of its eight objections. Pet. App. 5a, 25a. In addition to the objection to the leaflet, the administrative law judge sustained two other objections, which are not at issue in this petition. *Id.* at 37a-41a. Also, at the outset of the hearing, petitioner moved to change its name from Macmillan Publishing, Inc. to Pearson Education, Inc. because, in November 1998, Viacom had sold Macmillan to Pearson. *Id.* at 25a.

that many of the changes cited by petitioner had occurred prior to the second election, and had already been considered, and rejected, by the court of appeals as a basis for dismissing the Union's election petition. *Id.* at 9a-10a, 13a-14a, 16a. The Board found that other changes, alleged to have occurred since the second election, provided no basis under well-established law for finding the certified unit no longer appropriate. *Id.* at 14a-17a. The Board explained that the alleged changes "are no different in nature or extent than one would normally expect to occur with the passage of time," and if treated as sufficient to warrant finding a unit inappropriate, "certifications of representative would be illusory." *Id.* at 16a.

5. Petitioner filed a petition for review of the Board's October 31, 2001, order in the court of appeals. The court affirmed the Board's decision. Pet. App. 1a-11a. The court agreed with the Board that the leaflet "threatened to withhold a promised wage increase if the union won the election." *Id.* at 7a. The court explained that, under settled law, an employer's statement that a previously announced wage increase will probably be lost if a union wins constitutes employer coercion. *Id.* at 7a-9a. The court agreed with the Board that the leaflet "explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." *Id.* at 8a. The court referred to the statements in the leaflet that "[w]ithout a Union, [petitioner] will be free to proceed ahead with the announced wage increases," but "[w]ith a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package will be," followed by the question "WHY TAKE THE RISK?." *Ibid.* The court agreed with the Board that the leaflet, including the quoted statements, was coercive because it sent

"the clear message that, in the absence of the Union, [petitioner] is willing to grant the raise, but if the Union wins the election, [petitioner] will pay only what the Union can force it to pay." *Ibid.* (quoting *id.* at 34a). The Court recognized that the Union could legally bargain away the raise, but agreed with the Board's conclusion that "[t]he message of the leaflet is that the Union would have to bargain to get the employees the raise, and this is simply not true." *Id.* at 9a (quoting *id.* at 37a).[2]

The court rejected petitioner's contention that changed circumstances made the bargaining unit or certification inappropriate. The court noted that, in the first appeal, it had considered and rejected most of petitioner's alleged changed circumstances—including the consolidation of the two separate facilities into one new facility, and changes to work procedure and technologies used by employees—as a basis for dismissing the Union's election petition. Pet. App. 9a-10a. The court further concluded that additional asserted post-election changes in ownership and employee turnover were "each insufficient grounds to render a certification no longer appropriate." *Id.* at 10a. The recent change of ownership, the court noted, made no difference because there was no claim that less than half of the employees after the change had been employed by petitioner prior to the change. *Ibid.* Finally, the court rejected as contrary to settled law petitioner's reliance on post-election employee turnover. *Ibid.* The court also noted that it was "unclear whether the relevant bargaining unit has changed in size at all," and, in any event, the

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[2] Having agreed with the Board that the leaflet was objectionable, the court declined to reach the additional alleged objectionable conduct by petitioner. Pet. App. 9a.

court held that "even a doubling in size of the bargaining unit is not the kind of change that alters the ongoing validity of a Board certification." *Id.* at 10a-11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. a. Contrary to petitioner's claim, this case raises no question about the interpretation of Section 8(c) of NLRA, 29 U.S.C. 158(c), and the First Amendment. Section 8(c) protects only employer communications that "do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969), quoting 29 U.S.C. 158(c). As the court of appeals held, the Board correctly found that petitioner's leaflet threatened to withhold a promised wage increase if the Union won the election, by stating that "the promised wage increase will be put in jeopardy if employees choose the Union." Pet. App. 8a. The law is clear that a wage increase, such as that promised by petitioner, "must be awarded even if a union wins an election." *Id.* at 9a, citing *Advo System, Inc.*, 297 N.L.R.B. 926, 940 (1990), and *Arrow Elastic Corp.*, 230 N.L.R.B. 110, 113 (1977), enforced, 573 F.2d 702 (1st Cir. 1978). Petitioner's leaflet, however, sent "the clear message" that, if the Union won, petitioner "will pay only what the Union can force it to pay." *Id.* at 8a. The court concluded that the message that a previously announced wage increase would probably be lost if a union wins "constitutes employer coercion." *Id.* at 7a-8a, citing *Flamingo Hilton-Laughlin*, 324 N.L.R.B. 72, 111 (1997) (employer threat during election campaign to withdraw a pay raise previously

announced in campaign is "a heavy suppression of employees' rights to engage in protected activities"), enforced in relevant part, 148 F.3d 1166, 1175 (D.C. Cir. 1998).

Petitioner's disagreement with the interpretation of the leaflet by both the court and the Board is a fact-bound issue that does not warrant further review by this Court. Petitioner argues that the leaflet constituted merely a permissible communication by an employer of the potential risks of unionization, and petitioner faults the court and the Board for reading "into the leaflet something it did not state." Pet. 14. Even if the leaflet were open to differing interpretations, further review by this Court would not be warranted to determine which one is correct. In any event, the Board and the court of appeals correctly concluded that the leaflet was a threat. As the court explained, the leaflet—which told employees that the announced increase, amounting to "$2,522.00 next year," was "what . . . you have to lose if the Union wins"—was an explicit statement "that the promised wage increase would be put in jeopardy" if the employees selected the Union. Pet. App. 8a. This Court has long recognized that, in assessing employer statements, the Board and reviewing court must take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel Packing Co.*, 395 U.S. at 617. Accord *Southwire Co.* v. *NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987). The court of appeals correctly affirmed the Board's determination that, from the viewpoint of the employees, the leaflet did not convey merely the message that the Union could bargain the

raise away as part of the collective-bargaining process, but instead conveyed the false and coercive message that, if the Union won, employees would not get the promised raise to which they were entitled unless the Union could induce the employer to restore it. Pet. App. 9a, 37a.[3]

b. Equally without merit is petitioner's argument (Pet. 16-18) that the Board improperly failed to evaluate the leaflet in the context of surrounding circumstances. Not only did the Board consider surrounding circumstances, but it reasonably found (Pet. App. 22a, 39a), contrary to petitioner's assertion, that surrounding circumstances corroborated the coercive nature of the leaflet. Thus, the Board found that supervisors told employees, at an employee meeting and separately,

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[3] The coercive nature of the message in the leaflet contrasts with the permissible message that petitioner relies on (Pet. 14-15) in *Lee Lumber & Building Material Corp.*, 306 N.L.R.B. 408, 409-410 (1992), reviewed as to other matters, 117 F.3d 1454 (D.C. Cir. 1997), where the employer told employees that "the Union might raise the pension/profit sharing issue, as it had in previous negotiations, and that the subject would be negotiable." Contrary to petitioner's claim (Pet. 15), *Technology Service Solutions*, 332 N.L.R.B. 1096, 1108-1109 (2000), reconsidered as to other matters, 334 N.L.R.B. 116 (2001), does not support petitioner's argument. The finding on which petitioner relies in *Technology Service Solutions* was not reviewed by the Board (332 N.L.R.B. at 1096 n.5), and, accordingly, cannot be considered precedent for any other case. See *Stanford Hospital & Clinics* v. *NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 1042 (2004); *Colgate-Palmolive Co.*, 323 N.L.R.B. 515, 515 n.1 (1997). In any event, in *Technologoy Service Solutions*, unlike here, the employer assured the employees that a newly granted wage increase would be left in place no matter how the election turned out, while merely advising of the possibility that the collective-bargaining process might *later* result in an agreement to lower wages. 332 N.L.R.B. at 1108-1109.

that they would not get the announced raise if the Union were voted in. *Id.* at 22a, 39a, 40a. Also at an employee meeting, petitioner's head of human resources, when asked if petitioner's president had promised that employees would still get the raise if the Union were voted in, stated: "I don't remember, but I don't believe you will, because when we go to negotiate, if the union gets in, we start at zero." *Id.* at 39a. That official repeated the same admonition at a later employee meeting when he said that, if the Union got in, employees would "lose benefits" and everything "would go back to zero." *Id.* at 22a, 39a. See *TRW-United Greenfield Div.* v. *NLRB*, 637 F.2d 410, 420-421 (5th Cir. 1981) (employer's remarks that it will "bargain from scratch" or from "ground zero" constitute impermissible threats where they are likely to be understood as implying that the employer might either "unilaterally discontinue existing benefits prior to negotiations, or * * * adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees for choosing collective representation"); accord *Belcher Towing Co.* v. *NLRB*, 726 F.2d 705, 711 (11th Cir. 1984). The Board reasonably found that those statements, far from reassuring employees that petitioner would grant the promised wage increase even if the Union won, instead reinforced the threat in the leaflet. Pet. App. 22a, 39a, 41a. In any event, petitioner's disagreement with that particular factual finding does not warrant review by this Court.

2. Petitioner's claim (Pet. 22) that alleged changed circumstances affected the propriety of the Board's certification, or its bargaining order based on that certification, presents no issue warranting review. Indeed, the court of appeals' decision is consistent with long-established precedent rejecting such changes as a basis

for invalidating a union's certification as bargaining representative or a bargaining order based on the certification, and petitioner has shown no reason for this Court to reconsider that precedent.[4]

For example, a change in ownership itself has no impact on a union's certification or the employer's bargaining obligation. See *NLRB* v. *Burns Int'l Sec. Servs.*, 406 U.S. 272, 279 (1972). Similarly, petitioner's reliance on asserted employee turnover is inconsistent with this Court's decision in *Brooks* v. *NLRB*, 348 U.S. 96, 98-99, 103-104 (1954). In *Brooks*, this Court held that after a valid election and Board certification, a union, absent strictly defined "unusual circumstances," is entitled to an irrebuttable presumption of majority status, ordinarily for one year—"the certification year"—during which it may pursue negotiations for a collective-bargaining agreement unhampered by challenges to its majority status. *Id.* at 98-99.[5] Consistent with that policy, it has long been recognized that employee turnover does not justify a refusal to recognize

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[4] Moreover, as the court of appeals held in its first decision, several of the changes petitioner points to (Pet. 9-11)—its consolidation of its two older facilities in the new facility and changes to work procedure and to technologies used by bargaining-unit employees—are simply irrelevant because the Union's certification was based on the second election, which was conducted after the move to the new facility had already taken place. Pet. App. 9a-10a, 45a-46a.

[5] Where, as here, an employer initially refuses to bargain in order to challenge the union's certification, the Board has long held that the certification year typically runs from the date the employer actually "begins to bargain in good faith" with the union, irrespective of the date of actual certification. See *Van Dorn Plastic Machinery Co.*, 300 N.L.R.B. 278, 279 (1990), enforced, 939 F.2d 402, 404 (6th Cir. 1991); *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 786 (1962).

and bargain with a certified union.[6] See, *e.g.*, *NLRB* v. *Aquabrom, Div. of Great Lakes Chem. Corp.*, 855 F.2d 1174, 1184 (6th Cir. 1988) (because union was never given chance to bargain, *Brooks* precludes employer from relying on inevitable turnover as basis for refusal to bargain); *NLRB* v. *Wackenhut Corp.*, 471 F.2d 761 (6th Cir. 1972) (per curiam) (contention that substantial turnover relieves employer of duty to bargain is directly contrary to *Brooks*); *V & S Schuler Engineering, Inc.*, 332 N.L.R.B. 1243, 1243 (2000) (turnover not the kind of "unusual circumstance" within the meaning of *Brooks* that would permit rebuttal of the Union's majority status or warrant reexamination of its certification), enforced, 309 F.3d 362 (6th Cir. 2002). See generally *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 786 (1996) (certification year removes "any temptation on the part of the employer to avoid good-faith bargaining").[7]

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[6] Petitioner's related argument, based on the claim that the facility's entire workforce has doubled since the second election, is factually and legally infirm. As the court correctly observed (Pet. App. 10a), petitioner failed to allege whether, and to what extent, the *bargaining unit* has changed in size, as distinct from its entire work force. In any event, as the court properly held, even an incremental doubling in the size of a bargaining unit is not the kind of change that alters the ongoing validity of a Board certification. *Id.* at 10a-11a. See *NLRB* v. *Action Automotive, Inc.*, 853 F.2d 433, 434 (6th Cir. 1988), cert. denied, 488 U.S. 1041 (1989).

[7] The cases petitioner cites (Pet. 19-20) for the proposition that the Board has relied on changed circumstances to find certified bargaining units inappropriate are inapposite. For example, *Ramada Inns, Inc. d/b/a Ramada Beverly Hills*, 278 N.L.R.B. 691 (1986), did not, as here, involve whether changed circumstances affected a union's certification during the certification year or the propriety of an order requiring the employer to recognize and bargain with the union. Rather, the Board in that case was faced

Petitioner's reliance (Pet. 21) on decisions of courts of appeals considering changed circumstances, such as employee turnover, in reviewing the propriety of bargaining orders issued pursuant to *NLRB* v. *Gissel Packing Co.*, *supra*, is misplaced. In *Gissel Packing*, this Court held that, where a union enjoyed majority status prior to the election, the Board is authorized to issue a remedial bargaining order if it finds that use of traditional remedies would likely not erase the effects of past unfair labor practices and ensure a fair election or rerun election. 395 U.S. at 614-615. While some courts have examined turnover and other changed circumstances in reviewing *Gissel* bargaining orders, no court has adopted petitioner's suggestion that turnover occurring after a Board certification of election results is an independent basis for overturning a Board order requiring bargaining. See *Scepter, Inc.* v. *NLRB*, 280

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with a new representation petition and relied on changed circumstances in reconsidering a unit determination it had made three years earlier. In the other cases cited, the bargaining obligation ended because, unlike here, the bargaining unit had been radically changed by a dramatic event. See *Kelly Business Furniture, Inc.*, 288 N.L.R.B. 474, 475 (1988) (11 employees from certified unit were moved and merged into new workforce with 35 other employees); *Border Steel Rolling Mills, Inc.*, 204 N.L.R.B. 814, 814-815 (1973) (bargaining unit did not survive transfer of equipment to new employer and inclusion of 12 employees from that certified unit into a 400 "all employee" unit at new workplace represented by a different union); *Renaissance Ctr. P'ship*, 239 N.L.R.B. 1247, 1247 (1979) (certified unit of 59 employees merged with unrepresented group of 67 employees); *St. Bernadette's Nursing Home*, 234 N.L.R.B. 835, 836-837 (1978) (no bargaining obligation where facility that employed between 55-70 employees in the certified unit closed and employer subsequently opened new 207-employee facility including 15 employees from the prior facility's certified unit).

F.3d 1053, 1057 (D.C. Cir. 2002), citing *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1299-1303 (D.C. Cir. 1988) (distinguishing *Gissel* bargaining orders and orders based on a union's certification); *Aquabrom Div. of Great Lakes Chemical Corp.*, 855 F.2d at 1185-1186 (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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PEARSON EDUCATION, INC.,
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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITIONER'S REPLY TO OPPOSITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO OPPOSITION FOR WRIT OF CERTIORARI

Respondent, National Labor Relations Board ("NLRB" or "Board"), filed its brief in opposition to Pearson Education, Inc.'s ("Pearson") Petition for Writ of Certiorari on December 22, 2004. Pearson, which previously has provided an accurate Rule 29.6 statement (Pet. at ii), now responds to points raised by the NLRB.

I. Contrary to the NLRB's view, this case does raise important questions about the interpretation of the First Amendment and Section 8(c) of the National Labor Relations Act. At issue is the appropriate test to be applied when analyzing whether an employer communication is entitled to the broad protections of the First Amendment.

The NLRB argues that Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c) ("Act"), which incorporates the First Amendment into that Act, specifically prohibits "threats of reprisal," and because both the Board and the Appellate Court found the leaflet to be a threat, that ends the matter and thus, no First Amendment question is raised. That superficial analysis begs the question, and accepting it at face value would mean that the NLRB could run roughshod over an employer's First Amendment rights simply by labeling a communication as a "threat."

During a union organizing campaign, an employer is entitled to the full protection of the Constitution's First Amendment with one limited exception. Section 8(c) prohibits a "threat of reprisal," which given its commonly understood meaning, means that an employer cannot tell its employees it will take an adverse action against them in retaliation for their support of a union. *See NLRB v. Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967). No such statement was made in the instant case. Instead, Pearson's predecessor, Macmillan, told employees in the leaflet that, through the collective bargaining process, there was a risk that the wages they would have at the end of that process could be less. It is well established that such statements are a legitimate description of the collective bargaining process.

The NLRB cited *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), for the proposition that a message that a previously announced wage increase would probably be lost if the union won constitutes employer coercion. (Bd. Br. at 9) In

that case, however, the employer made a series of reprisal statements, including *affirmatively* stating that a previously announced wage increase likely *would be withheld* if the union won. Macmillan's leaflet did not say, unlike the employer in *Flamingo-Hilton*, that the Company would probably withhold the scheduled wage increase if the union won.

In fact, the NLRB acknowledges Pearson's point that the leaflet conveyed a message about the risk of bargaining, but the Board also contends the leaflet conveyed the message that employees would not get the increase unless the union could negotiate it back. (Bd. Br. at 10-11)[1] Once again, that is not what Macmillan's leaflet said. The leaflet did not state, "and if you vote for the union, we won't give you the wage increase as scheduled," nor did it state that "we will only give you that portion of the scheduled wage increase that the union is able to negotiate." It stated that, because all wages and benefits were subject to negotiation, no one could predict what the final wage package would be.[2]

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[1] The NLRB seeks to distinguish *Technology Service Solutions*, 332 NLRB 1096 (2000), *inter alia*, on the basis that the employer assured employees a newly granted wage increase would be left in place regardless of how the election turned out while "merely advising of the possibility that the collective bargaining process might *later* result in an agreement to lower wages." (Bd. Br. at 11 n.3) Here, as noted, the leaflet did *not* state that Macmillan would not leave the scheduled wage increase in place. Furthermore, that case illustrates Pearson's other First Amendment argument on the importance of considering the context of a challenged communication. Macmillan's President had told employees in group meetings that they would get the scheduled wage increase regardless of how the election turned out. If it was acceptable for the employer in *Technology Service Solutions* to "merely advise" employees about the possibility that collective bargaining might later result in an agreement to lower their wages, which would include the scheduled increase, it was equally acceptable under Section 8(c) for Macmillan to do so.

[2] The Board cites *Advo System, Inc.*, 297 NLRB 926 (1990) and *Arrow Elastic Corp.*, 230 NLRB 110 (1977), *enforced* 573 F.2d 702 (1st Cir. 1978), for the proposition that a promised wage increase must be awarded

To allow the NLRB to label an employer communication as a "threat of reprisal" for statements it did not make is a clear violation of an employer's First Amendment rights. This Court should address the important constitutional issue of the appropriate standards to be applied when the NLRB analyzes whether an employer communication falls outside the broad protections of the First Amendment.

II. The leaflet was the sole basis upon which the Court of Appeals sustained the bargaining order. Thus, contrary to the NLRB's argument, context and surrounding circumstances were not considered before determining that the leaflet was a threat of reprisal. Reaching a conclusion on a communication taken out of context is contrary to an employer's important First Amendment rights.

As Pearson noted, this case also raises the important constitutional issue of whether the government violates an employer's broad First Amendment rights when it interprets a single communication (that is but one part of a continuum of communications on the same issue) in isolation and out of context as a "threat of reprisal" and not constitutionally protected free speech. The NLRB contends that surrounding

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even if the union wins an election. (Bd. Br. at 9) First, Macmillan's leaflet never said that it would not give the wage increases as scheduled. Furthermore, in both of those cases, the Board also relied on the proposition that during an election campaign an employer should act as if the union were not in the picture. *Advo*, 297 NLRB at 940; *Arrow Elastic*, 230 NLRB at 113. Significantly, this is the very proposition that the Court of Appeals specifically rejected in this case in its first decision denying enforcement of the Board's bargaining order. The Court of Appeals stated "[t]here is no such principle governing employer communications during election campaigns, and we doubt that there could be in light of the First Amendment." (Pet. App. at 48a) The Court of Appeals found that the Regional Director's rationale was the "antithesis of reasoned decisionmaking, and as such was arbitrary and capricious." (Pet. App. at 49a)

circumstances were considered and found to corroborate the coercive nature of the leaflet. (Bd. Br. at 11) The information upon which the NLRB relies, however, dealt with an entirely separate objection made by the Union upon which the Court of Appeals did not rule. The Board found the Union's objection to Macmillan's one-page leaflet was "independently sufficient to set aside the election." (Pet. App. at 20a) The Court of Appeals agreed and thus stated, "we do not need to reach the additional allegations of objectionable conduct by the Company." (Pet. App. at 9a)

Thus, as to the issue in this case, the one-page leaflet, neither the Board nor the Court took into account context and surrounding circumstances. A significant First Amendment issue is raised when the government determines that a communication is unlawful without even considering the context and circumstances of the communication. Here, other communications from Macmillan talked about the unpredictability of the collective bargaining process. Furthermore, the Company President told employees that they would get the wage increase irrespective of how the election turned out. A Human Resource representative also told employees that, if a wage increase had been promised by the President, it would become part of the wage baseline from which negotiations began. Further ignored was the important fact that just days before Macmillan's leaflet, the Union had issued a written communication from it's lawyer stating that a) Macmillan could withhold the wage increase if the Union lost and further, b) that if the Union won, it would be unlawful for Macmillan to withhold the wage increase. Macmillan's leaflet legitimately responded to those points made by the Union's letter. All of this evidence is highly relevant context to the subsequent leaflet and was not considered in making the determination that it was a threat.

An employer's First Amendment right is illusory if its communication can be isolated from all other relevant context and then be found unlawful.

III. Significant changed circumstances can have a substantial impact on individual employees' Section 7 self-determination rights, which form the foundation of national labor policy, and changed circumstances have not been addressed by the Court for half a century.

Finally, the NLRB contends that no court has adopted Pearson's argument on changed circumstances. That may be true, but it is unclear whether a case raising the issue in the context presented by this one has ever been addressed by a court of appeals. Furthermore, and importantly, very little has been said by this Court on changed circumstances and employees' Section 7 rights, and the primary case that addressed them, *Brooks v. NLRB*, 348 U.S. 96 (1954), is over 50 years old.

Because it is well recognized that employees' Section 7 right of self-determination is the foundation of the Nation's labor policy, clearly an important issue of federal law is presented by the question of when changed circumstances and those Section 7 rights should be trumped by a certified bargaining unit. Pearson pointed out that in a variety of other circumstances the NLRB has had no difficulty in finding bargaining units to no longer be appropriate because of changed circumstances that had occurred since the Board certified the unit. (Pet. at 19-20)

The NLRB unconvincingly tries to brush off its prior decisions relied upon by Pearson. (Bd. Br. at 14 n.7) The fact remains that in each of those NLRB decisions, the Board held that the employer was no longer required to bargain with the union because changed circumstances that had occurred since the time the Board certified the unit made the unit no

longer appropriate. No compelling reason is offered as to why significant changed circumstances over the course of several years (the majority of which occurred *after* the second election) could not also make the certified unit here no longer appropriate. Dissenting Board Member Hurtgen agreed with Pearson that at a minimum, the record should have been reopened to take evidence on the changed circumstances. (Pet. App. 17a-18a)

Furthermore, in bargaining order cases under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), several appellate courts have recognized that changed circumstances can make a remedial bargaining order inappropriate because of an "obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of the current ones to decide whether they wish to be represented by a union." *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996). *See also HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1333 (2nd Cir. 1996). The Board acknowledges that appellate courts have considered changed circumstances in *Gissel* bargaining order cases (Bd. Br. at 15) but contends no court has adopted the position argued by Pearson.[3] This Court, however, has not had occasion to address the important issue of changed circumstances in non-*Gissel* bargaining order cases such as the instant one. The interplay among employees' Section 7 rights, federal labor policy, and changed circumstances is highly worthy of being addressed and clarified by this Court.

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[3] The Board cites cases for the proposition that change in ownership *itself* or employee turnover itself have no impact on a union's certification. Maybe so, but Pearson does not rely on a single isolated change, but a multitude of changes that collectively should be analyzed.

CONCLUSION

For all the reasons articulated above, Pearson Education prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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